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Supreme Court, U.S.
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No. 95-266

In The

Supreme Court of the United States

October Term, 1995

CARRIE JAFFEE, as Special Administrator
for Ricky Allen, Sr., Deceased,

Petitioner,

v.

MARYLU REDMOND, Hoffman Estates Police Officer,
and VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

07/03/91	Complaint
08/19/91	Amended Answer of Defendant Marylu Redmond
08/19/91	Amended Answer of Defendant Hoffman Estates
03/26/92	Motion by Defendant Marylu Redmond to Quash Subpoena to Karen Beyer; file Defendant Redmond's Memorandum in Support of Motion to Quash
03/26/92	Plaintiffs' Preliminary Response to Defendant Redmond's Motion to Quash
03/26/92	Order: Defendant Redmond's Motion to Quash is Denied
04/14/92	Plaintiffs' Motion to Compel Defendant Marylu Redmond's Presence at her Continued Deposition, and to Compel Answers to Deposition Questions
04/14/92	Defendant Redmond's Objections to Plaintiffs' Motion to Compel
04/14/92	Order: Plaintiffs' motion to compel defendant Marylu Redmond's presence at her continued deposition is granted; deposition to be held on or before April 30, 1992
06/23/92	Motion by movant Karen Beyer for reconsideration of court's denial of motion to quash subpoena for deposition

06/23/92	Order: Beyer's motion for reconsideration of this court's denial of the motion to quash subpoena is denied. This Court rules orally from the bench as to the limited scope of her deposition.
09/30/92	Plaintiffs' motion to compel answers to deposition questions
09/30/92	Order: The court rules orally from the bench granting plaintiffs' motion to compel answers to deposition questions. Defendant Beyer is not required to answer questions regarding the payment issue.
11/13/92	Plaintiffs' Motion for Sanctions
11/13/92	Defendant's Response to Plaintiffs' Motion for Sanctions
12/04/92	Order: Setting hearing on plaintiffs' motion for sanctions for 12/10/92 at 9:30 a.m.
12/10/92	Order: Evidentiary hearing held and concluded; status hearing set for 01/07/93 at 8:45 a.m.
02/03/93	Plaintiffs' second motion to compel answers to deposition questions and motion to modify order of December 10, 1992
02/05/93	Order: Plaintiffs' second motion to compel answers to deposition questions is granted. Order of 12/10/92 is modified in in accordance with the court's oral ruling.

03/03/93	Plaintiffs' motion to impose sanctions on defendant Redmond
03/04/93	Order: Status hearing held. Evidentiary hearing is set for 03/08/93 at 9:30 a.m.
03/08/93	Order: Leave granted to William C. Barasha to file his appearance as counsel for non-party Karen A. Beyer. Evidentiary hearing begins. Evidence heard and concluded. Evidentiary hearing ends. Cause taken under advisement.
3/22/93	Memorandum of Law in Support of Defendant's Motion to Quash
03/26/93	Response of Karen A. Beyer, a third party witness, to plaintiffs' motion to impose sanctions on defendant Marylu Redmond and/or defendant Village of Hoffman Estates,
04/06/93	Order granting plaintiffs' motion to impose sanctions on defendant Redmond and said defendant is precluded at trial from testifying as to her version of the event because plaintiffs' attorneys have been blocked from effective cross examination The matter as to non party Beyer is referred to the US Attorney's office for possible criminal contempt proceedings under FRCP 42(b)
04/12/92	File memorandum opinion
12/08/93	Defendants' motion to reconsider, December 6, 1993
12/10/93	Order granting defendant's motion to reconsider and to vacate its order entered 4/6/93 to a limited extent pursuant to this court's oral

	ruling.
12/13/93	Trial begins
12/22/93	Trial concludes; verdict for plaintiff Carrie Jaffee and against defendants' Marylu Redmond and Village of Hoffman Estates. Jury returns its verdict finding in favor of plaintiff Carrie Jaffee and against defendant Mary Lu Redmond and assessing damages in the amount of $45,000 on the first claim and finding in favor of plaintiffs Carrie Jaffee and Brandon Allen and against defendants Mary Lu Redmond and the Village of Hoffman Estates and assessing damages in the amount of $500,000 on the second claim. Jury polled. Jury discharged. Trial ends. Enter judgment on the verdict.
12/22/93	Enter judgment
01/19/94	Notice of appeal filed by Mary Lu Redmond, Village of Hoffman Estates

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CARRIE JAFFEE, as Special Administrator for Ricky Allen, Sr. and LECHIA ALLEN, Next Friend of RICKY ALLEN, JR. and BRANDON ALLEN

Plaintiffs,

No. 91 C 4153 *v.*

MARYLU REDMOND, Hoffman Estates Police Officer and VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Defendants.

COMPLAINT

Plaintiffs Carrie Jaffee, as Special Administrator for Ricky Allen, Sr., deceased, and Plaintiff Lechia Allen, Next Friend of Ricky Allen, Jr., and Brandon Allen, allege as follows:

COUNT I

1. Count I of this complaint arises under 42 U.S.C. §1983. The jurisdiction of this Court is conferred by 28 U.S.C. 1343.

2. Plaintiff Carrie Jaffee is a resident of the Northern District of Illinois and maintains this action pursuant to Ill.Rev.Stat. ch. 110, 12-1008 as Special Administrator for Ricky Allen, Sr., deceased.

3. Plaintiff's decedent Ricky Allen, Sr. was born in 1960 and died on June 27, 1991, as a result of the wrongful acts of Defendant Redmond, as described with greater specificity below. Plaintiff's decedent is survived by his mother, Carrie Jaffee, and by his two minor children, Ricky Allen, Jr. and Brandon Allen.

4. Defendant Marylu Redmond was at all times relevant acting under color of her employment as a police officer of the Village of Hoffman Estates, Illinois.

5. Defendant Hoffman Estates is a municipal corporation of the State of Illinois and is joined in this action in Count II pursuant to

28 U.S.C. § 1367(a).

6. On June 27, 1991, at or about 12:00 noon, while engaged in the course of her official duties as a police officer of the Village of Hoffman Estates, Defendant Redmond responded to a call of a disturbance at the Canyon Estates Apartments in Hoffman Estates.

7. Shortly after arriving at the Canyon Estates Apartments, Defendant Redmond shot and killed Plaintiff's decedent Ricky Allen, Sr.

8. In June of 1991, it was clearly established law that a police officer could not, consistent with the Fourth and Fourteenth Amendments to the Constitution of the United States, use deadly force other than when necessary to prevent death or great bodily harm.

9. At the time she came upon Plaintiffs decedent Ricky Allen, Sr., Defendant Redmond knew, or should reasonably have known, that her use of deadly force was not necessary to prevent death or great bodily harm.

10. The above described actions of the Defendant Redmond caused Plaintiff's decedent, Ricky Allen, Sr., to be deprived of his rights secured by the Fourth and Fourteenth Amendments to the Constitution of the United States, not to be subjected to unreasonable seizures and not to be deprived of life without due process of law.

COUNT II

11. Count 11 of this complaint is a wrongful death action arising under Ill. Rev. Stat. ch. 70, par. 1 et seq..

12. Plaintiff Jaffee restates and realleges paragraphs 2-10 of Count I of this complaint.

13. At all times relevant, there has been in force and effect a statute of the State of Illinois known as Ill. Rev. Stat. ch. 38, par. 7-5 entitled "Peace officer's use of force in making arrest," which provides in pertinent part that a police officer:

> [I]s justified in using force likely to cause death or great bodily harm only when he reasonably believes that such force is necessary to prevent death or great bodily harm to

himself or such other person, or when he reasonably believes both that:

(1) Such force is necessary to prevent an arrest from being defeated by resistance or escape; and

(2) The person to be arrested has committed or attempted a forcible felony which involves the infliction or threatened infliction of great bodily harm or is attempting to escape by use of a deadly weapon, or otherwise indicates that he will endanger human life or inflict great bodily harm unless arrested without delay.

14. At the time she came upon Plaintiff's decedent, Defendant Redmond was not seeking to arrest Plaintiff's decedent and Defendant Redmond knew, or reasonably should have known, that her use of deadly force was not necessary to prevent death or great bodily harm.

15. At all times relevant, there has been in force and effect a statute of the State of Illinois known as Ill. Rev. Stat. ch. 38 par. 7-1 entitled "Use of force in defense of person," which provides in pertinent part that a person:

> "[I]s justified for use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony."

16. At the time she came upon Plaintiff's decedent, Defendant Redmond knew or reasonably should have known that her use of deadly force was not necessary to prevent imminent death or great bodily harm to another individual or herself or to prevent the commission of a forcible felony.

17. Notwithstanding the facts set out above, Defendant Redmond shot and killed Plaintiff's decedent, thereby causing his death.

18. The action of Defendant Redmond constituted willful and wanton conduct, in that Defendant Redmond acted in utter

indifference to rights secured to Plaintiff's decedent by the law of the State of Illinois and by the Fourth and Fourteenth Amendments to the Constitution of the United States.

19. The actions of Defendant Redmond described above were undertaken in the course of, and within the scope of, her employment as a police officer of Defendant Village of Hoffman Estates, Illinois.

20. Plaintiff's decedent exercised due care at all times material and relevant to this complaint.

21. Each and every beneficiary and next of kin of the decedent exercised due care at all times relevant and material to this Complaint.

22. At the direction and proximate result of the willful and wanton acts of Defendant Redmond causing the death of Plaintiff's decedent, the next of kin of Plaintiff's decedent have sustained substantial pecuniary loss and damage.

COUNT III

23. Count III of this Complaint arises under 42 U.S.C. § 1983. The jurisdiction of this Court is conferred by 28 U.S.C. 1343.

24. Plaintiff Lechia Allen maintains Count III as the next friend of her minor children, Ricky Allen, Jr., and Brandon Allen, who also are the children of Ricky Allen, Sr.

25. Plaintiff Allen realleges paragraphs 4-8 of Count 1.

26. At the time she came upon Ricky Allen, Sr., Defendant Redmond knew, or should reasonably have known, that her use of deadly force was not necessary to prevent death or great bodily harm.

27. The actions of the Defendant Redmond caused Ricky Allen, Jr., and Brandon Allen, without due process of law, to be wrongfully deprived of their right secured by the Fourteenth Amendment to the United States Constitution, to associate with their father, Ricky Allen, Sr.

JURY DEMAND

28. Plaintiffs hereby demand trial by jury for all claims.

WHEREFORE Plaintiffs pray that judgment be entered in their favor against Defendants Redmond and the Village of Hoffman Estates in an amount in excess of $1,000,000.00.

/s/ Kenneth N. Flaxman
one of the attorneys for plaintiffs

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

AMENDED ANSWER

NOW COMES defendant MARYLU REDMOND, by and through her attorneys, SEGAL MCCAMBRIDGE SINGER & MAHONEY, LTD., and in answer to plaintiffs' Complaint states as follows:

COUNT I

1. Defendant denies that plaintiff has any meritorious claim against her arising under 42 U.S.C. 1983. Defendant does not contest the jurisdiction of this Court.

2. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of 12 and on that basis denies same.

3. Defendant denies that Ricky Allen, Sr., died as a result of any wrongful act of this defendant; defendant admits that Ricky Allen was born in 1960 and that he died on June 27, 1991; defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of par. 3, and on that basis denies same.

4. Defendant admits the allegations of par. 4.

5. Defendant admits that Hoffman Estates is an Illinois municipal corporation, but makes no answer to the remaining allegations of par. 5 which pertains solely to co-defendant Village of Hoffman Estates.

6. Defendant admits the allegations of par. 6.

7. Defendant admits the allegations of par. 7.

8. Defendant denies that the allegations set forth in par. 8 completely set forth the applicable clearly established law, as of June 1991, with regard to a police officer's use of deadly force.

9. Defendant denies the allegations and conclusions of par. 9.

10. Defendant denies the allegations and conclusions of par. 10.

COUNT II

11. Defendant denies that plaintiff has any meritorious claim against her arising under the statutory provision cited.

12. Defendant restates her answers to pars. 2-10 of Count I as her answers to this paragraph, as though fully set forth herein.

13. Defendant admits the existence of the statute cited, which speaks for itself.

14. Defendant denies the allegations of par. 14.

15. Defendant admits the existence of the statute, which speaks for itself.

16. Defendant denies the allegations and conclusions of par. 16.

17. Defendant admits that she shot and killed plaintiff's decedent, but denies that this was done "[N]otwithstanding the facts set out above ..."

18. Defendant denies the allegations and conclusions of par. 18.

19. Defendant admits that her actions were undertaken in the course of, and within the scope of her employment as a police officer of Hoffman Estates.

20. Defendant denies the allegations of par. 20.

21. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation of par. 21 and on that basis denies same,

22. Defendant denies the allegations of par. 22.

COUNT III

23. Defendant denies that plaintiff has any meritorious claim against her under 42 U.S.C. §1983. Defendant does not contest this Court's jurisdiction.

24. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of par. 24 regarding the relationship of Lechia Allen, Ricky Allen, Jr., and Brandon Allen, and Ricky Allen, Sr. and on that basis denies same.

25. Defendant restates her answers to pars. 4-8 of Count I as her answer to this paragraph, as though fully set forth herein.

26. Defendant denies the allegations and conclusions of par. 26.

27. Defendant denies the allegations and conclusions of par. 27.

WHEREFORE, defendant MARYLU REDMOND denies that plaintiffs are entitled to judgment against her in any amount whatsoever. Defendant prays that judgment be entered in her favor, and against the plaintiffs, dismissing plaintiff's complaint and awarding defendant her costs.

/s/ Gregory E. Rogus
Attorneys for Defendant

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

MOTION TO QUASH

NOW COMES defendant MARYLU REDMOND, through counsel, and hereby moves this Honorable Court to quash a certain subpoena issued by plaintiffs' counsel, for deposition and for production of certain records, and in support of this motion states as follows:

1. The present lawsuit involves claims of deprivation of various constitutional rights and for wrongful death under Illinois state law arising from the death of Ricky Allen on June 27, 1991. Defendant MaryLu Redmond is a police officer for the Village of Hoffman Estates. The plaintiffs contend that Officer Redmond utilized unconstitutional excessive force, and engaged in wilful and wanton misconduct, in shooting Ricky Allen on the aforesaid date.

2. At her deposition, Officer Redmond testified that subsequent to the June 27, 1991 incident, she received counseling from Karen Beyer, who is the Director of Health and Human Services for the Village of Hoffman Estates. Plaintiffs' attorney then inquired into the content of any conversations or discussions between officer Redmond and Ms. Beyer, and defendant's attorney interposed objection based upon the privileged nature of any communications between the officer and Ms. Beyer.

3. Plaintiffs' counsel has now issued a subpoena directed to Ms. Beyer, copy of which is attached hereto as Exhibit A. The subpoena commands Ms. Beyer to appear and to testify at deposition, and to produce and permit inspection and copying of, *inter alia*, "... all notes, records, reports, pertaining to MaryLu Redmond."

4. As the affidavit of Karen Beyer, attached hereto as Exhibit B, demonstrates, the only communications between Officer Redmond and Ms. Beyer occurred after the incident and within the context of the counseling relationship. Furthermore, Ms. Beyer did

not witness the incident, nor does she have any first-hand knowledge of any of the events which occurred at the scene of the incident on the date of the incident.

5. The plaintiffs' subpoena invades the confidentiality attendant to those communications between the officer and her counselor and infringes upon Officer Redmond's right to privacy and her reasonable expectation that those communications remain confidential.

6. Defendant respectfully submits that any and all communications between Officer Redmond and Ms. Beyer, and any and all "notes, records, reports pertaining to MaryLu Redmond" are privileged, under applicable law, from disclosure since such communications took place within the setting of a professional counseling relationship.

7. Defendant therefore ask this Court to quash said subpoena.

8. In support of this motion, defendant submits herewith her Memorandum of Law.

/s/ Gregory E. Rogus
an attorney for defendant

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

AFFIDAVIT

KAREN BEYER, being first duly sworn, on oath deposes and states as follows:

1. I have personal knowledge of the matters set forth in this affidavit, and I am competent to testify to these matters.

2. I am a licensed clinical social worker. I received my Masters Degree in social work from Loyola University of Chicago. I am also a certified employee assistance counselor.

3. I am employed by the Village of Hoffman Estates. My title is Director of Health and Human Services.

4. The only conversations or contact I have had with Ms. MaryLu Redmond since June 27, 1991 have been in my professional capacity as a licensed clinical social worker and certified employee assistance counselor and have pertained to my provision of counseling and counseling services to Ms. Redmond.

5. I was not present at the Grand Canyon Estates Apartments at any time on June 27, 1991, nor did I witness any shooting, nor any events pertaining to any shooting, at that address on that date.

/s/ Karen Beyer

[jurat omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

**MEMORANDUM OF LAW IN SUPPORT
OF DEFENDANT'S MOTION TO QUASH**

Defendant, MARYLU REDMOND, through her attorneys, submits the following arguments and authorities in support of her motion to quash the subpoena issued by plaintiffs' attorney directed to Karen Beyer.

Background

The plaintiffs have brought a three count Complaint at Law against the Village of Hoffman Estates and one of its police officers, Marylu Redmond, arising out of the shooting death of plaintiffs' decedent, Ricky Allen, on June 27, 1991. In Count I, the plaintiff alleges that Officer Redmond utilized unconstitutional excessive force, thereby violating the decedent's Fourth Amendment right to be free from unreasonable seizure and Fourteenth Amendment right not to be deprived of life without due process of law. Recovery is sought pursuant to 42 U.S.C. §1983. In Count II, the plaintiffs contend that Officer Redmond's conduct was wilful and wanton and amounted to utter indifference to the rights of Ricky Allen. Plaintiffs seek recovery in this count pursuant to Illinois' Wrongful Death Act. Finally, in Count III, plaintiffs assert a Fourteenth Amendment claim for deprivation of the rights of two of the decedent's children to associate with their father.

Officer Redmond appeared and testified at deposition on January 15, 1992, and again on January 21, 1992. In response to questions posed by plaintiffs' attorney, the defendant stated that she has been undergoing counseling following the shooting, and that her counselor is Karen Beyer, who is employed as the Director of Health and Human Services for the Village of Hoffman Estates. As shown in the affidavit submitted in conjunction with the present motion, Ms. Beyer is a licensed clinical social worker, holding a

Masters Degree in Social Work from Loyola University of Chicago. She is also certified as an employee assistance counselor.

At the deposition, plaintiffs' attorney sought to inquire into conversations between Ms. Redmond and Ms. Beyer. Defendant's attorney objected on the grounds that any such conversations or communications between the two were privileged.

Plaintiff's attorney has now issued a subpoena directed to Ms. Beyer commanding her to appear and to testify at deposition, and to produce and permit inspection and copying of, *inter alia*, " ... all notes, records, reports pertaining to Marylu Redmond." The defendant objects to any such attempt to invade the confidential nature of Ms. Redmond's professional relationship with Ms. Beyer and the communications taking place within the context of that relationship.

In her affidavit, Ms. Beyer states that the only conversations or contact she has had with Ms. Redmond since June 27, 1991 have been in her professional capacity as a licensed clinical social worker and certified employee assistance counselor, and have pertained to her provision of counseling and counseling services to Ms. Redmond. Furthermore, Ms. Beyer was not a witness to, nor does she have any first-hand knowledge of any of the events surrounding the June 27, 1991 shooting.

Defendant respectfully contends that her conversations and communications with Karen Beyer are privileged by law against disclosure. since the subpoena clearly manifests plaintiff's intent to probe into matters which are so privileged, defendant is moving this Court to quash said subpoena.

Arguments and Authorities

The starting point for determining the legal basis of defendant's claim of privilege is Rule 501 of the Federal Rules of Evidence, which states:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by

> the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, state, or political subdivision thereof shall be determined in accordance with state law.

The Historical Note to this rule indicates that the initial bill submitted for consideration by the Congress contained thirteen rules addressing the matter of privileges. While none of these specifically articulated a counselor-client privilege or a social-worker-client privilege, there was an analogous psychotherapist-patient privilege defined in proposed Rule 504. Ultimately, however, Congress opted to eliminate these specific rules and to provide, instead, for a single general rule governing privileges in the courts of the United States. Congress' election in this regard, though, was not intended to preclude recognition of specific privileges. Rule 501 instructs federal courts that recognition of a privilege "shall be governed by the principles of the common law as they may be interpreted by the Courts of the United States in light of reason and experience. Thus, rather than precluding the recognition of ... a privilege, Rule 501 'envisions the flexible development of the federal common law of privilege on a case-by-case basis."' *Sabree v. United Brotherhood of Carpenters and Joiners of America, Local No. 33*, 126 F.R.D. 422 at 424 (D.C.Mass. 1989) (citing *In re Production of Records to Grand Jury*, 618 F.Supp. 440, 442 (D.C.Mass. 1985) quoting *United States v. Gillock*, 445 U.S. 360, 367, 100 S.Ct. 1185, 1190, 63 L.Ed.2d 454 (1980). With reference to the psychotherapist-patient privilege, the District Court in *Sabree* further noted, quoting Senate Report No. 93-1277:

> It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient .... or any other of the enumerated privileges contained in the Supreme Court Rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege

> *based on a confidential relationship and* other privileges should be determined on a case-by-case basis.

Sabree, 126 F.R.D. at 424, 425 (emphasis added).

Of additional significance under the Historical Note is the Conference Committee's adoption of the House version of Rule 501, which required the application of state privilege law in civil actions and proceedings where the rule of decision as to a claim or defense is supplied by state law, as opposed to the Senate version, which called for greater restriction on the applicability of state privilege law.

In the present non-diversity case, the plaintiffs are pursuing claims under both federal and state substantive law. It would appear, in light of the Conference Committee's action, that state privilege law should be applied to plaintiffs' state law claim, and federal common law to the federal claim. While this might, in other contexts, present a serious dilemma, defendant respectfully contends that none is posed here, since the interests to be addressed and those sought to be protected are equivalent within the framework of both the federal and state claims being asserted. Therefore, while the mechanism for arriving at a determination of recognized privilege may differ somewhat with regard to plaintiff's different claims, the result should be, and is, the same.

Given plaintiff's assertion of a claim under Illinois' Wrongful Death Act coupled with the allegation of "wilful and wanton" misconduct under state law, consideration must be given to Illinois law governing the issue of privilege. once again, the communications sought to be protected from disclosure are those between an individual and a counselor/clinical social worker occurring within the counseling setting. The applicable rule is clearly stated in the Illinois Mental Health and Developmental Disabilities Confidentiality Act, S.H.A. ch. 91½ §800 et. seq.

Section 10(a) of the Act (S.H.A. ch. 91½, §810(a)) states, in pertinent part, as follows:

> Except as provided herein, in any civil, criminal, administrative, or legislative proceeding, or in any proceeding preliminary thereto, a recipient, and a therapist on behalf and 'in the interest of a recipient, has the privilege to refuse to disclose and to prevent the disclosure of the recipient's record or communications.

The Act provides the following definitions in §2 (S.H.A. ch. 91½ § 802):

> (1) "Confidential communication" or "communication" means any communication made by a recipient or other person to a therapist or to or in the presence of other persons during or in connection with providing mental health or developmental disability services to a recipient. Communication includes information which indicates that a person is a recipient ...
>
> (3) "Mental health or developmental disability services" or "services" includes, but is not limited to, examination, diagnosis, evaluation, treatment, training, pharmaceutical, aftercare, habilitation, or rehabilitation ...
>
> (6) "Recipient" means a person who is receiving or has received mental health or developmental disabilities services ...
>
> (7) "Record" means any record kept by a therapist or by an agency in the course of providing mental health or developmental disabilities services to a recipient concerning the recipient and the services provided. Record does not include the therapist's personal note if such notes are kept in the therapist's sole possession for his own personal use and are not disclosed to any other person, except the therapist's supervisor, consulting therapist, or attorney. If at any time such notes are disclosed, they shall be considered part of the recipient's record for purposes of this Act ...
>
> (9) "Therapist" means a psychiatrist, physician, psychologist, social worker, or nurse providing ment health or developmental disabilities services *or any other person not Prohibited by law from providing su services or from holding himself out as a therapist* if the recipient reasonably believes that such person is permitted to do so . . .

(emphasis added)

Finally, regarding a therapists "personal notes", the Act goes on to provide, at § 3 (ch. 91½ § 803):

> (a) All records and communications shall be confidential and shall not be disclosed except as provided in this Act.
>
> (b) A therapist is not required to, but may, to the extent he determines it necessary and appropriate, personal notes regarding a recipient. Such personal notes are the work product and personal property of therapist and shall not be subject to discovery in judicial, administrative, or legislative proceeding any proceeding preliminary thereto.

The foregoing statutory definitions and prohibitions clearly applicable to the present case. Marylu Redmond is a "recipient" of "mental health or developmental disability services" from Karen Beyer, a "therapist." Therefore, both Officer Redmond, and Ms. Beyer have the privilege to refuse to disclose and to prevent the disclosure of Ms. Redmond's record and/or her communications with Ms. Beyer. Additionally, Ms. Beyer's notes, if any, are not subject to discovery nor to disclosure. None of the exceptional provisions of the Act apply.

Consideration of the Illinois case law construing this Act lends persuasive and compelling reinforcement to its applicability to the present case. In *House v. Swedish American Hospital* 206 Ill.App. 3d 437, 564 N.E.2d 922 (2d Dist. 1990), the Appellate Court stated that the purpose of the Mental Health Act is to protect the confidentiality of the records and communications of those persons receiving mental health services, and that this general prohibition against disclosure of this information was enacted to protect the patient's privacy rights, along with providing an inducement to seek such treatment. *House*, 564 N.E.2d at 926. The Court went on to hold that certain hospital records pertaining to psychiatric admissions were not discoverable.

In *In re Marriage of Semmler*, 90 Ill.App.3d 649, 413 N.E.2d 502 (2d Dist. 1980), the Court held that a "clinical family therapist" was a therapist within the meaning of the Act. Therefore, certain statements made to that therapist by one spouse in a

professional consultation were privileged from disclosure at the behest of the other spouse during divorce proceedings in court.

In *Martino v. Family Service Agency of Adams County*, 122 I11.App.3d 593, 445 N.E.2d 6 (4th Dist. 1983), the Appellate Court held that marriage counseling is included within the purview of confidentiality. Citing *Semmler*, the Court noted that "... This interpretation of the Confidentiality Act is consistent with the recommendations of the 1976 Report of the Governor's commission for Revision of the Mental Health Code of Illinois chaired by the Honorable Joseph Schneider of the Circuit Court of Cook County. This report introduced the proposed Confidentiality Act by stating that it *was intended to include all those persons entering into a therapeutic relationship with clients...*" *Martino*, 445 N.E.2d at 11. (emphasis added) The *Martino* Court also pointed out that the Illinois Social Workers Registration Act (S.H.A. ch. 111 § 6324) prohibits a social worker from disclosing any information he may have acquired from persons consulting him in his professional capacity which was necessary to enable him to render services in that capacity to those persons. *Martino*, 445 N.E.2d at 10. While the particular statutory provision has since been repealed, the legislature has enacted a new Clinical Social Work and Social Work Practice Act (S.H.A. ch. 111, § 6351 et. seq.) which continues the prohibition in effect and expressly incorporates in its entirety the Mental Health and Developmental Disabilities Confidentiality Act. (See S.H.A. ch. 111, § 6366.)

Finally, in *People v. Saastetter*, 177 Ill.App.3d 982, 532 N.E.2d 1029 (2d Dist. 1988), the Act was applied to communications between a criminal defendant and a "master clinician" from a mental health community center. Particularly noteworthy in this case is the court's observation that the fact that defendant was receiving help for his mental problems in no way indicates that he was making his mental condition a defense to the charges against him.

In the present case, any contention or suggestion that Officer Redmond has somehow introduced her own mental condition or any aspect of the counseling services received from Karen Beyer for such condition as an element of her defense must be uncategorically rejected. It is the plaintiffs who are here attempting to unjustifiably pry into and make an issue out of t officer's

counseling relationship with Ms. Beyer. As amply shown, it is exactly such attempts against which the Act was designed to protect.

In sum, Officer Redmond is clearly entitled, as a matter o state law, to refuse to disclose and to prevent the disclosure her communications with Karen Beyer.

With respect to those claims asserted by plaintiffs under federal law, defendant readily acknowledges, under Rule 501, that it is not the state law of privilege which controls, but rather the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, as the Seventh Circuit has stated, this does not mean that federal courts should not consider the law o the state in which the case arises in determining whether a privilege should be recognized as a matter of federal law. A strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy. And where a state holds out the expectation of protection to its citizens, they should not be disappointed by a mechanical and unnecessary application of the federal rule. *Memorial Hospital for McHenry County v. Shadur,* 664 F.2d 1058, 1061 (7th Cir. 1981), citing *United States v. King,* 73 F.R.D. 103, 105 (E.D.N.Y. 1976) and *Lora v. Board of Education,* 74 F.R.D. 565 (E.D.N.Y. 1977).

In making the case-by-case determination regarding recognition of privileges, the Seventh Circuit has utilized a balancing approach, weighing the need for truth against the importance of the relationship or the policy sought to be furthered by the privilege, and the likelihood that recognition of the privilege will in fact protect that relationship in the factual setting of the case. *Jennings v. D.H.L. Airlines,* 101 F.R.D. 549, 550 (N.D.Ill. 1984), citing *Ryan v. I.R.S.,* 568 F.2d 531, 543 (7th Cir. 1977). Under this approach, the District Court in Jennings granted a plaintiff's motion to quash a subpoena directed by the defendant to plaintiff's psychologist. Judge Marshall there recognized the critical importance of confidentiality with regard to communications between a therapist and patient:

> "... The relationship at stake here is the relationship between a psychotherapist and his patient. The policy which underlies the privilege is that 1[u]nlike the patient with physical complaints who will consult a physician regardless of whether confidentiality is guarantee, a neurotic or psychotic individual may seek help only if he is assured that his confidences will not be divulged, even in a courtroom.' (citation omitted) In this case, knowledge that disclosure of confidential information would occur would likely have damaged plaintiff's relationship with her psychologist ... Had she known that (the psychologist) might be required to disclose her confidences in a lawsuit...her trust in (the psychologist) doubtless would have diminished."

Jennings, 101 F.R.D. at 550, 551.

While it is true that the federal cases cited herein do not speak specifically of a "licensed clinical social worker-client" or a "counselor-client/patient" relationship, there is no legitimate logical reason to disassociate the principles and the reasoning of those cases from the present context. The important factors to consider are the therapeutic function being served and the therapeutic nature of the relationship, and not simply the labels attached to the individuals involved. While Karen Beyer may not technically be a psychologist nor a psychiatrist, she is nonetheless a professional to whom Officer Redmond reasonably turned to obtain counseling following a difficult episode in her own professional life. The state of Illinois has seen fit to encourage such efforts to pursue appropriate measures aimed at the restoration and/or maintenance of sound mental/emotional health, and to protect the confidences of those persons undertaking such measures for their well-being. Federal courts should do likewise.

This is not to belittle the importance of the Court's fact finding function, nor to suggest little regard for the "need for truth", but only to strike the proper balance. Recognition of the privilege asserted in this case will not, unlike the *Memorial Hospital for McHenry County* case, prevent the plaintiffs from otherwise establishing their claim, since plaintiff's claim does not arise out of the communications or information being sought via the subpoena but rather from an event or occurrence which exists independently of those matters. See *Memorial Hospital,* 664 F.2d at 1062, 1063.

Conversely, failure to recognize the privilege will utterly destroy the relationship between Officer Redmond and her counselor and obliterate whatever good has and will come of that relationship.

Conclusion

Based on the foregoing, defendants respectfully move for entry of an order quashing the subpoena directed to Karen Beyer.

/s/ Gregory E. Rogus
Attorneys for Defendant

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

PLAINTIFFS' PRELIMINARY RESPONSE TO DEFENDANT REDMOND'S MOTION TO QUASH

Plaintiff has subpoenaed records maintained by Karen Beyer, the Director of Health and Human Services of defendant Village of Hoffman Estates. Ms. Beyer, a licensed clinical social worker and certified employee assistance counselor, has met with defendant Redmond for 90 minute sessions two or three times a week, starting sometime after Redmond killed plaintiff's decedent Ricky Allen. Defendant Redmond, who is on medical leave because she is psychologically unfit to work as a police officer, has moved to quash the subpoena.

Redmond's motion to quash raises several questions:

1. Should the Court recognize a therapist-patient privilege? Compare *In re Zuniga*, 714 F.2d 632, 639 (6th Cir. 1983) (recognizing privilege) with *United States v. Corona*, 849 F.2d 562, 567 (11th Cir. 1988) (refusing to recognize privilege).

2. If the Court does recognize a therapist-patient privilege, should the privilege extend beyond Proposed Federal Rule of Evidence 504, which limited the privilege to physicians and licensed or certified psychologists? See *Cunningham v. Southlake Center for Mental Health*, 125 F.R.D. 474, 477 (N.D.Ind. 1989) (stating that while Seventh Circuit would recognize therapist-patient privilege, the "privilege should not be extended beyond the parameters of proposed Rule 504 to social workers." *Compare Jennings v. D.H.L. Airlines*, 101 F.R.D. 549, 550-51 (N.D.Ill. 1984) (applying privilege to a clinical psychologist).

3. If the Court recognizes a privilege for counseling sessions conducted by a licensed clinical social worker and certified employee assistance counselor who is also the an employee of defendant Village of Hoffman Estates, disposition of the motion to

quash turns on a balancing of the competing interests. *See Lora v. Board of Education of City of New York*, 74 F.R.D. 565 (S.D.N.Y. 1977).

A fair disposition of the balancing of interests requires an expanded record. There are a variety of factors in the background of defendant Redmond, as well as in the way she has acted following the shooting, that make evidence about her post-incident counselling sessions of crucial relevance to her credibility and to her ability to recall. Accordingly, if the Court is of the opinion that disposition of defendant's motion turns on a balancing of competing interests, plaintiff requests leave to file (under seal) an evidentiary submission by April 6, 1992.

Respectfully submitted,

/s/ Kenneth N. Flaxman
an attorney for plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

PLAINTIFFS' MOTION TO COMPEL DEFENDANT MARYLU REDMOND'S PRESENCE AT HER CONTINUED DEPOSITION, AND TO COMPEL ANSWERS TO DEPOSITION QUESTIONS

Plaintiffs, by counsel, request that the Court enter an Order compelling defendant Redmond to appear at her continued deposition to answer questions concerning conversations with Karen Byer.

As grounds for this motion, plaintiffs state as follows:

1. Plaintiffs brought this lawsuit to seek damages for the June 27, 1991 shooting death of Ricky Allen, Sr., by Hoffman Estates, Illinois police officer MaryLu Redmond.

2. Written discovery in the case commenced shortly after filing of the lawsuit in early July 1991.

3. When deposed on January 21, 1992, defendant Redmond was asked a series of questions concerning her conversations with Karen Byer, a social worker employed by defendant Village of Hoffman Estates, Illinois.

4. Defendant Redmond asserted a privilege to these questions and refused to answer. (See relevant testimony attached as Exhibit A)

5. In its oral opinion of March 26, 1992, this Court ruled that conversations between Redmond and Byer are not privileged.

6. In light of the Court's ruling, plaintiffs have sought to recommence Redmond's deposition. (See Exhibit B, attached)

7. Redmond has refused to return and answer questions. (See Exhibit C, attached)

8. A telephone conference between counsel has failed to resolve this disagreement.

WHEREFORE, plaintiffs request that this Court enter an Order compelling defendant Redmond to appear on Thursday, April 23, at 10:00 a.m. at the offices of Futterman & Howard, 122 South Michigan, Suite 1850, Chicago, Illinois, or any other such date and time as the Court deems appropriate, and to answer questions about her conversations with Byer.

DATED: April 8, 1992

/s/Jennifer K. Soule
one of the attorneys for plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

DEFENDANT'S OBJECTION TO
PLAINTIFF'S MOTION TO COMPEL

NOW COMES defendant MARYLU REDMOND, through her attorneys SEGAL MCCAMBRIDGE SINGER & MAHONEY, LTD., and hereby objects to the plaintiffs' "Motion to Compel Defendant MaryLu Redmond's Presence at Her Continued Deposition, And To Compel Answers to Deposition Questions," for the reasons set forth below.

1. In their motion, the plaintiffs seek to reconvene the deposition of defendant MaryLu Redmond for the purpose of inquiring into communications between Ms. Redmond and Karen Beyer. These communications had been the subject of a separate, though related, attempt by the plaintiffs to procure, through subpoena, certain records and testimony from Karen Beyer. Plaintiffs claim, as their authority for proceeding with the present motion, this Court's oral ruling of March 26, 1992, which denied defendant's notion to quash that subpoena. A copy of the transcript of proceedings before this Court on that date is attached hereto as Exhibit A.

2. It is true, as the plaintiffs have shown through the Exhibits attached to their motion, that this defendant has asserted a privilege against disclosure with respect to the aforesaid communications. Defendant hereby reasserts that privilege and incorporates the arguments and authorities presented in defendant's previously filed Motion to Quash and Memorandum of Law in Support of Defendant's Motion to Quash, in objecting to the present motion.

3. Notwithstanding this Court's oral pronouncement on the issue of privilege, defendant respectfully submits that the plaintiffs are, nevertheless, not entitled to the relief sought in the present motion.

4. The Court's March 26, 1992 ruling rested upon the premise that the federal claim embodied in plaintiffs' lawsuit is the one that would basically control issues of admissibility (which are of course closely linked up with issues of discoverability.) (See transcript, p. 2)

5. The federal claim which plaintiffs are asserting in the present case alleges the use of excessive force by an individual law enforcement officer. (See Complaint, Counts I and III, attached hereto as Exhibit B.)

6. Under the Supreme Court's holding in *Graham v. Connor*, U.S._, 109 S.Ct. 1865 (1989), all claims that law enforcement officials have used excessive force — whether deadly or not — in the course of an arrest, investigatory stop, or other "seizure" are to be analyzed under the Fourth Amendment's objective reasonableness standard. Under this standard, the inquiry focuses upon whether the officer's actions were objectively reasonable in light of the facts and circumstances confronting him/her, without regard to underlying intent or motivation. The reasonableness of a particular use of force is to be judged from the perspective of a reasonable officer on the scene, taking into consideration that police officers are often forced to make split-second judgements in circumstances that are tense, uncertain, and rapidly evolving, about the amount of force that is necessary in a particular situation. Hindsight is inappropriate to the analysis. Subjective motivation and intent are not to be considered.

7. Given this standard, it is the objective reasonableness of Officer Redmond's conduct at the time of the shooting upon which the trier of fact must focus in determining whether any federal constitutional violation occurred which would entitle the plaintiffs to money damages or other relief.

8. The plaintiffs, through counsel, have now stated their intention to this Court to utilize any information which they seek in connection with these privileged communications to possibly consult a clinical psychologist for evaluative purposes. (See transcript, Ex. A, p. 8) Defendant contends that any such "evaluation" would be improper and inadmissible, given the parameters of relevancy established by Graham.

9. Furthermore, privilege or no, there is no question that whatever communications have occurred between defendant and Karen Beyer were, at a minimum, sensitive. In *Powers v. Chicago Transit Authority*, 846 F.2d 1139 (7th Cir. 1988), our Court of Appeals instructed that "... district courts have a responsibility to protect sensitive information in discovery, where the utility of that information is less than the injury its disclosure may do, *even if the information is not technically privileged.*" 846 F.2d at 1143. (emphasis added)

10. In the present case, disclosure of communications between the defendant and Ms. Beyer would be injurious in the extreme — it would totally destroy a professional, therapeutic relationship which is completely dependent upon the maintenance of confidentiality in order to achieve its unquestionably useful and desirable, and legally protected goal of fostering, restoring, and/or maintaining sound mental/emotional health and well-being.

11. On the other hand, the utility of information to be obtained should plaintiff be allowed to pry into these confidential communications is, at best, highly doubtful in light of *Graham*, and certainly "less than the injury its disclosure may do." The officer has already provided lengthy, detailed deposition testimony. The existing record of this case is voluminous, and discovery is ongoing with regard to purported eyewitness accounts of events, facts, and circumstances pertaining to this incident, the sum total of which will provide a more than ample testing of the objective reasonableness of Officer Redmond's conduct in the face of those facts and circumstances.

For these reasons, defendant objects to plaintiff's efforts to reconvene her deposition and respectfully requests that the Court deny plaintiff's motion to compel.

/s/ Gregory E. Rogus
an attorney for defendant

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

KAREN BEYER'S MOTION FOR RECONSIDERATION OF COURTIS DENIAL OF MOTION TO QUASH SUBPOENA FOR DEPOSITION

Now comes KAREN BEYER, LCSW, CEAP, by her attorneys, Sandra G. Nye and Associates, and for her Motion for Reconsideration of the Court's denial of the Motion to Quash Subpoena heretofore filed by Defendants herein, states as follows:

1. KAREN BEYER, LCSW, CEAP, is a Licensed Clinical Social Worker in the State of Illinois, and a Certified Employee Assistance Professional. Through the Employee Wellness Program of the Village of Hof fman Estates, she is and has been a psychotherapist providing psychotherapy services to MARY LU REDMOND, Defendant.

2. The Employee Wellness Program is an "employee assistance program" providing physical and psychological health services to employees of the Village. A copy of the Supervisor's Manual describing the program is appended hereto, designated Exhibit A, and by this reference incorporated herein. 2. Said BEYER has been served with a Subpoena to appear and give deposition testimony and produce her clinical records in the within cause. A copy of the said Subpoena is appended hereto, designated Exhibit B, and by this reference incorporated herein.

3. Defendants moved to quash the said Subpoena, asserting a privilege pursuant to Rule 501 of the Federal Rules of Evidence and Ill.Rev.Stat., ch. 91½, pars. 802, 803 and 810.

4. By ruling on March 26, 1992, this Court denied the Motion to Quash citing the standards set forth in Proposed Rule 504, which defines "psychotherapist" as a psychiatrist or psychologist, and referring to the discussion in Weinstein at pages 504-03 at 504-17-19 and 504-05 at 504-24.

5. BEYER has an affirmative duty arising out of her fiduciary duty to her patient, Defendant MARY LU REDMOND, the Code of Ethics of the National Association of Social Workers (NASW), and the Code of Professional Conduct of The Employee Assistance Society of North America (EASNA) , and pursuant to the Illinois Mental Health and Developmental Disabilities Confidentiality Act, Ill.Rev.Stat. ch. 91½, pars. 302 and 810 (a) , and the Clinical Social Work and Social Work Licensing Act of Illinois, Ill.Rev.Stat. ch. 111, par. 6366, to present this Motion to this Court and urge that the Court reconsider the matter in light of additional information and arguments which heretofore have not been presented herein.

6. BEYER respectfully asserts that communications made to her in the course of psychotherapy with MARY LU REDMOND are confidential and should be protected by a privilege in this action.

In support of this Motion, BEYER states as follows:

I.

Rule 501 intends that a federal common law be developed by the courts addressing the matter of privilege on a case-by-case basis in light of reason and experience.

The question of whether a privilege is to be recognized in a case is "governed by the principles of the common law as they may have been interpreted by the courts of the United States in the light of reason and experience." Fed.R.Evid. 501. *Memorial Hospital for McHenry County v. Shadur,* 1981, 664 F.2d 1058, 1061. Federal Rule 501 envisions the flexible development of the federal common law of privilege on a case-by-case basis. *United States v. Gillock,* 445 U.S. 360, 367, 100 S.Ct. 1185, 1190, 63 L.Ed.2d 454 (1980). In developing the federal common law of privilege, a district court must appraise both the federal and state interests in the matter, balancing the federal interest involved against the rationale and comparative strength underlying the particular evidentiary privilege claimed. *In re Production of Records to Grand Jury,* 618 F.Supp. 440 (D.C.Mass. 1985); *Ott v. St. Luke Hospital of Campbell County, Inc.,* 522 F.Supp. 706, 707 (E.D.Ky. 1981).

Resort to state law analogies is proper for the development of a federal common law of privileges in instances in which the federal rule is unsettled. *Thompson v. General Nutrition,* 671 F.2d 100, 104 (4th Cir. 1982), citing e.g., *Riley v. City of Chester,* 612 F.2d 798 (3d Cir.1979).

Privilege in federal law for communications to social workers is not settled. The United States District Court for Massachusetts has recognized it in *In re Production of Records to the Grand Jury,* 618 F.Supp. 440 (1985), stating:

> [T]his court recognizes, as a matter of federal evidentiary law, a qualified privilege for those records :11, which concern communications made to a social worker in his or her professional capacity ... insofar as the communication relates to the care and treatment of a patient. 618 F. Supp. at 441.

See also *Lora v. Board of Education,* 74 F.R.D. 565, 575 (E.D.N.Y.1977), recognizing a limited privilege outweighed by other considerations before the court.

The Northern District of Indiana has declined to recognize a privilege for communications to a social worker in *Cunningham v. Southlake Center for Mental Health, Inc.,* 125 F.R.D. 474 (N.D.Ind.1989), but that case is distinguishable from ours. Indiana privilege law reads very differently from that of Illinois, strictly limiting privilege to persons holding doctoral degrees in psychology, and a social worker would not be allowed to cla m a privilege under Indiana law. In *Cunningham,* "Dopson [the s cial worker] has a masters degree in social work and his title is Crisis Intervention Specialist." The court held, "The psychotherapist- patient privilege should not be extended beyond the parameters of proposed Rule 504 to *social workers such as Dopson.*" (emphasis added) Dopson was required to testify as to certain statements. The patient's records, however, were protected by another state statute, and without her consent to disclose them, the court refused to order their disclosure. *Cunningham,* 125 F.R.D. 474, 478. It would appear from the language and reasoning in Cunningham that, had Indiana law recognized a privilege as to the patient's communications to Dopson, the Court would have recognized it.

In the instant cause, however, Illinois law mandates a privilege protecting records and information conveyed to a clinical social worker in the course of providing mental health services, including psychotherapy. (See detailed analysis in Section VII below.) Karen Beyer is a clinical social worker who provided mental health services to Mary Lu Redmond. Mary Lu's records and communications to Karen Beyer are privileged under Illinois law, and in this case "the psychotherapist-patient privilege should be extended beyond the parameters of Rule 504 to social workers such as" Beyer.

II.
Rule 501 envisions the flexible development of the federal common law of privilege. Mental health treatment has changed, and the profession of clinical social work has developed considerably since Rule 504 was proposed. Clinical social workers are recognized as psychotherapists in Illinois and many other states. Flexible development of the law requires evolution of the concepts of Rule 504 to reflect that development.

Proposed Rule 504 was developed in 1972. At that time, the social work profession was in its early adolescence. The practice of social work was largely generic — all social workers were trained to perform all social work functions: essentially casework, group work, community organization, and administration. At that time, most mental health care was rendered by psychiatrists and a few psychologists. Both did psychotherapy. Although many social workers were trained as caseworkers, utilizing broad psychoanalytic principles, only a few at that time were trained as psychotherapists.

Since 1972, mental health care delivery has changed dramatically. In the past two decades, as a result of research and advances into the organic causes, diagnosis and biological treatment of some mental illness, and the development of psychotropic medication, many psychiatrists have ceased functioning as psychotherapists altogether and confine their activities to the medical and pharmaceutical aspects of mental health care. (The exception is psychoanalysts, who generally eschew the biological treatments.)

Typically, even during psychiatric hospitalizations the psychiatrist manages the patient's medication, laboratory tests, etc., and to the extent that psychotherapy takes place, it is done by psychologists and clinical social workers.

In 1972, clinical social work was in its infancy and not recognized as a separate specialty within the profession, and psychotherapy was not considered a function of social work. At that time, social workers were certified in Illinois, not licensed. The qualifications for certification were a degree from an accredited graduate school of social work, an application, citizenship or declaration of intent to become a citizen, being age 21 or greater and of temperate and moral habits, and passing an examination. Ill.Rev.Stat. ch. 111, pars. 6306-07, repealed 1988. "Social worker" was defined as:

> part-time basis, to render social services to individuals, groups or communities in any one or more of the fields of social casework, social group work, community organization for social welfare, social work research, social work administration or social work education.

Ill.Rev.Stat. ch. 111, par. 6302(d), repealed, 1988.

Since that time, however, the role of clinical social workers has developed as their training and functioning have expanded. As early as 1979, with the passage of the Illinois Mental Health and Developmental Disabilities Code, Ill.Rev.Stat. ch. 91½, par. 1-100 et seq., the Illinois legislature, in its definition of "qualified examiners," began to recognize specialization and levels of competence among social workers, and the fact that some — not all — social workers are qualified mental health care providers. Pursuant to Ill.Rev. Stat. ch. 91½, par. 2-602, qualified examiners, along with physicians and psychologists, are credentialed to examine persons alleged to be subject to involuntary admission, determine if they suffer from mental illness and meet at least one other criterion for commitment, and if so, certify them for commitment. The present wording of 2-602, is:

> §1-122. Qualified examiner. "Qualified examiner means a person who is (a) a Clinical social worker as defined in this Act ... A social worker who is a qualified examiner

> shall be a licensed clinical social worker under the Clinical Social Work and Social Work Practice Act.

Ill.Rev.Stat. ch. 91½, par. 1-122. (Prior to the licensure of clinical social workers, the language of this section defined as a qualified examiner a social worker with a master's degree and three years of post-masters experience in the treatment of mental illness.)

In 1985, the Illinois appellate court examined the role of the clinical social worker as psychotherapist in the case of *Horak v. Biris*, 130 Ill.App.3d 140, 474 N.E.2d 13 (1985), and found that an action for social work malpractice exists when the social worker is functioning as a psychotherapist.

> * * * We note that the field of practice engaged in by defendant here more closely resembles the practice of psychology rather than social work, as those two practices are currently defined in the Illinois Revised Statutes. (See. Ill.Rev.Stat. ch. 111, pars. 5304, 6302.) Because of the apparent overlapping of these two fields, we think the proofs may well reveal that defendant possessed or should have possessed a basic knowledge of fundamental psychological principles ...

In 1986, the Illinois Mental Health and Developmental Disabilities Code defined "clinical social worker."

> "Clinical social worker" means a person who (1) has a master's or doctoral degree in social work from an accredited graduate school of social work and (2) has at least 3 years of supervised postmaster's clinical social work practice which shall include the provision of mental health services for the evaluation, treatment and prevention of mental and emotional disorders.

Ill.Rev.Stat. ch. 91-1/2, par 1-122.1.

This Court noted in its oral ruling on the Motion to Quash that the training of a social worker does not equal that of the other mental health professions. With respect to clinical social workers, Karen Beyer respectfully avers that this is not the case.

Karen Beyer, in addition to her other post-graduate training, is a graduate of the two-year Family Therapy training program of the

Family Institute of Northwestern University. Her formal training at least equals that of the typical licensed clinical psychologist and exceeds that of many. She has had twelve thousand hours of experience in individual, family and marital psychotherapy, and she provides clinical supervision in psychotherapy for doctoral psychology students from six graduate psychology programs. See resume, Exhibit C appended hereto and by this reference incorporated herein.

It is to be noted that the preceptorship method of education, known as "supervision," is primary in all of the psychotherapy professions. It consists of regular (usually weekly) one-to-one sessions between an advanced trainer and the supervises. sometimes group supervision is also used. The supervises presents his or her cases in detail. Supervisor and supervises discuss the diagnosis of the patient, theoretical and practical approaches to the case, and the interpretation of the psychodynamic issues and psycho- therapeutic process. The supervisor provides teaching and direction for the case. Thus, the education and development of a clinical social worker-psychotherapist extends far beyond the two- year didactic classroom and practicum program of the master's degree. A clinical social worker who is also a certified employee assistance professional, such as Karen Beyer, has also undergone additional didactic training in substance abuse treatment to qualify her for that certification.

As to the education and training of a psychologist, a substantial part of the master's program is spent in the area of psychological testing and psychometrics. The Ph.D. program (mandated in Illinois for psychologists) places much emphasis on the research and writing of a dissertation, and not so much on clinical training. One year of post-doctorate supervised practice is required for psychology licensure.

While psychiatrists are first physicians, only a brief few weeks of medical school are spent in a psychiatric rotation, and little of that, if any, involves psychotherapy. In the four-year psychiatric residency, classes and supervision are provided in psychotherapy, but by far most of the resident's time is spent in the medical aspects of mental health treatment. When it comes right down to it, the psychotherapy training of a clinical social worker must be

said to stand on a par with that of the other mental health professions.

In 1989, Illinois enacted the Clinical Social Work and Social Work Practice Act, Ill.Rev.Stat. ch. 111, par. 6351 et seq., which differentiates between the practice of clinical social work and other social work practice. Paragraph 6353 provides in pertinent part as follows:

> §5. "Clinical social work practice" means the providing of mental health services for the evaluation, treatment, and prevention of mental and emotional disorders in individuals, families, and groups based on knowledge and theory of psychosocial development, behavior, psychopathology, unconscious motivation, interpersonal relationships, and environmental stress.
>
> §6. "Treatment procedures" means among other things, individual, marital, family and group psychotherapy.

Ill.Rev.stat. ch. 111, par. 6353 (5), (6).

Social work, as compared to clinical social work, is described as:

> social services to individuals, groups or communities in any one or more of the fields of social casework, social group work, community organization for social welfare, social work research, social welfare administration or social work education.

Ill.Rev.Stat. ch. 111, par. 6353 (9).

The qualifications for licensure as a clinical social worker are as follows:

> §9. Qualifications for License. A person shall be qualified to be licensed as a clinical social worker and the Department shall issue a license authorizing the independent practice of clinical social work to an applicant who:
> * * *
> 3. (a) Demonstrates to the satisfaction of the Department that subsequent to securing a master's degree in social work from an approved program the applicant has

successfully completed at least 3,000 hours of satisfactory, supervised clinical professional experience subsequent to the degree; or

(b) Demonstrates to the satisfaction of the Department that such applicant has received a doctor's degree in social work from an approved program and has completed at least 2,000 hours of satisfactory, supervised clinical professional experience subsequent to the degree;

4. Has passed the examination for the practice of clinical social work as authorized by the Department ...

In 1991, the legislature further recognized the expanded and advanced role of clinical social workers as mental health care practitioners when it amended the Illinois Insurance Code to require health insurers to reimburse insureds for mental health services provided by licensed clinical social workers. Ill.Rev.Stat. ch. 73, par. 982c.

The discussion of the District Court for New Jersey in the case of *In re Grand Jury Subpoena (Psychological Treatment Records)*., 710 F.Supp. 999 (D.N.J.1989) supports Karen Beyer's entreaty for flexibility and a new look at the issue:

> * * * [T]his court does not view Congress' decision to enact Rule 501 as it now stands as a rejection of the proposed privileges or as an intendment that the federal common law of privileges should be frozen as it existed at the time the Federal Rules of Evidence too effect. Rather, Rule 501 is a mandate to the courts to develop the federal common law of privilege as reason and experience dictates.
>
> Several Circuits faced with an assertion of a psychotherapist-patient privilege have ducked the recognition issue, holding instead that even if such a privilege was available under federal common law it was not applicable in the cases before them. [citing cases] Several district judges, including Judge Weinstein, however, have found the privilege to be part of the federal common law.

> E.g. *Lora*, 74 F.R.D. AT 574. ...; c.f. *In re Production of Records to Grand Jury*, 618 F.Supp. at 433 (recognizing a social worker-patient privilege under Rule 501) ...

Clearly, Illinois law has changed and developed since 1972 along with the changes and development of mental health care delivery. Consistent with present reality, Illinois recognizes clinical social workers as psychotherapists for privilege purposes, and, Karen Beyer respectfully urges, so should this Court.

III.
Privilege protection is for the benefit of patients, not to confer status on providers of professional services. Reason requires that privilege protection be applied equally for the benefit of all psychotherapy patients.

Lora v. Board of Education, 74 F.R.D. 565 (E.D.N.Y.1977), quotes from Report 45 of the Group for the Advancement of Psychiatry (GAP) 92 (1960):

> Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed privileged communication. While there may be exceptions to this general rule .... there is wide agreement that confidentiality is a sine qua non for successful psychiatric treatment. The relationship may well be likened to that of the priest-penitent or the lawyer client. Psychiatrists not only explore the very depths of their patients' conscious, but their unconscious feeling and attitudes as well. Therapeutic effectiveness necessitates going beyond a patient's awareness and, in order to do this, it must be possible to communicate freely. A threat to secrecy blocks successful treatment.

Lora, 74 F.R.D. at 575-76.

It is to be noted that when GAP wrote Report 45 in 1960, the concept of a privilege for psychotherapy communications was a novel one. Clearly, GAP was describing the psychiatric modality of psychotherapy in its report, not the other psychiatric modalities, such as medication (then little used), restraints, seclusion, electroconvulsive therapy, and at that time, psychosurgery. Psychotherapy was a little-known and mysterious entity available largely for the privileged few. GAP wrote its Report to educate the legal community toward the end of developing the law to meet the developments of mental health care delivery. The arguments made by GAP for a psychiatric privilege were and are arguments for a psychotherapy privilege, not arguments for treating the psychotherapy patients of a psychiatrist differently than those of a psychologist or social worker.

Today's psychotherapy patient is likely to have as his or her therapist a clinical social worker, but from the patient's point of view and need for privacy, it really should not matter. To be treated, the patient (no matter the discipline of the therapist) must lay bare his or her most intimate and embarrassing thoughts, dreams and fears — indeed, must be able to say *anything* to the therapist, and this cannot happen if the patient is not assured that these disclosures will not leave the therapy room. The privilege is to protect the patient and the treatment, not to set apart one professional from another.

Rule 501 requires the application of reason in recognizing a privilege. With respect, given the rationale for a psychotherapy privilege, how is it reasonable to declare that communications of a patient in the course of psychotherapy with a clinical social worker-psychotherapist should be any less protected than those of a patient who is treated by a psychiatrist-psychotherapist or a psychologist-psychotherapist?

The title or academic degree of the psychotherapist must be irrelevant. Confidentiality and privilege of mental health records and information are for the protection of the patient and to encourage persons to obtain mental health services without fear of their conditions being exposed to the community. *Laurent v. Brelje*, 74 Ill.App.3d 214, 216-217, 30 Ill.Dec. 164, 392, N.E.2d 929 (1979). The patient's need for privacy exists irrespective of

the letters after the name of his or her therapist.

IV.
The interpretation of Rule 502 (and proposed Rule 504) to exclude privilege protection to the patients of clinical social worker-psychotherapists results in unequal protection of the laws for persons who require psychotherapy and cannot afford to hire psychologists or psychiatrists.

Wealthy persons have the luxury of choosing any therapist they wish, regardless of discipline. Most people — including those who depend upon third-party reimbursement from health insurance, those who are members of HMOs or PPOs, employees who are dependent in part on Employee Assistance Programs, and those who are dependent upon community mental health centers for treatment — must take the therapist assigned to them. Psychotherapy treatment may be provided by psychiatrists, psychologists or clinical social workers. These days, most psychotherapy is done by clinical social workers, who provide some 65% of mental health care. The patient's need for psychotherapy, and his or her disclosures in psychotherapy, will be identical irrespective of the discipline of the therapist. To declare a privilege for the people who can afford psychiatrists or psychologists, and refuse one for those who must obtain treatment from a clinical social worker, would deprive the poor or less-wealthy of a legal protection available to those who could afford to pay for it. This surely cannot be the intent of this court and should not be allowed to happen as a latent consequence of an inflexible approach to the issue.

V.
The real issue in extending a privilege is not the title or training of a party to a protected relationship, but the protection of privacy of the patient and the interests of the community which give rise to a claim of privilege.

It is a principle fundamental to the fair administration of justice that the law has the right to everyone's evidence. No less

fundamental to the well-being of the community is the recognition that there must be exceptions to this rule under certain circumstances. Testimonial privileges exist when the need for information conflicts with other public interests, including the community's interest in preserving certain relationships of value it in which trust is an essential element. Privileges are permitted where the exclusion of "relevant evidence" 'has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" *Trammel v. United States,* 445 U.S. at 50, 100 S.Ct. at 912 (quoting *Elkins v. United States,* 364 U.S. 206, 234, 80 S.Ct. 1437, 1454, 4 L.Ed.2d 1669 (1960) (Frankfurter, J., dissenting)). *In re Doe,* 711 F.2d 1187,1193 (2d Cir.1983).

In the most influential text on the subject, Professor Wigmore has set forth four conditions necessary to the establishment of a privilege against the disclosure of communications:

> (1) The communication must be one made in the belief that it will not be disclosed.
>
> (2) Confidentiality must be essential to the maintenance of the relationship between the parties.
>
> (3) The relationship should be one that society considers worthy of being fostered.
>
> (4) The injury to the relationship incurred by disclosure must be greater than the benef it gained in the correct disposal of litigation.

8 J. Wigmore, Evidence § 2285, at 527 (McNaughton rev. 1961). See also, *In re Doe,* 711 F.2d 1187 (2d Cir.1983).

The interests promoted by a psychotherapist-patient relationship are extensive, including the promotion of understanding and exercise of many fundamental freedoms (e.g. those protected by the First Amendment), the ability of citizens to engage in rational thought and form belief and value systems, and the prevention of danger to the community from some mentally ill persons. *In re Zuniga,* 714 F.2d 632, 72 A.L.R.Fed. 380 (6th Cir.1983). *Zuniga* involved psychiatrists and a grand jury subpoena, but the basis upon which the court recognized a privilege was not specific to

psychiatrists -- it applies to the function of psychotherapy, irrespective of the profession of the therapist.

Without doubt, the psychotherapist-patient relationship meets the last three of Professor Wigmore's criteria. When, as in Illinois, a strong psychotherapist-patient privilege exists in state law, and representations have been made to the patient to that effect, the first criterion is also met. Further and specifically in this case, Mary Lu Redmond, as an employee of the Village of Hoffman Estates who received services from the Employee Wellness Program, had an expectation of confidentiality and privacy based upon the employee policies of the Village and the representations made to employees to induce them to seek treatment from the Program. See Exhibit A appended hereto and by this reference incorporated herein.

VI.
The patient of a psychotherapist who is a clinical social worker has no less right to or need of privacy than the patient of a psychiatrist or psychologist.

Lora thoroughly discusses the constitutional and social policy aspects of privacy in the context of mental health care. Among the points elaborated are:

> *** the interest in independence in making those choices that may seriously affect personal physical or mental health specifically, the right to be free to seek benefit from psychotherapeutic counseling. Cf. *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Doe v. Bolton,* 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed. 201 91973); *Whalen v. Roe,* 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977) .
>
> A forceful argument has been made that constitutionally protected privacy must, at a minimum, include the freedom of the individual to choose the circumstances, if any, under which some of his attitudes, beliefs and opinions are to be divulged. Ruebhausen and Brim, for example, usefully delineate this aspect of personal freedom as follows:

[A]nother ... facet of the claim to privacy ... is the right to share and to communicate. Each ... of us is well aware of this complicated, ambivalent personal need to communicate and the correlative need, even while communicating, to hold back some area, at least for the moment, of ourselves. Our personal experience is supported by the behavioral scientists. They have documented our need both to share and to withhold.

Psychologically, then, privacy is a two-way street consisting not only of what we need to exclude from or admit into our own thoughts or behavior but also of what we need to communicate to, or keep from, others. Both of these conflicting needs, in mutually supportive interaction, are essential to the well-being of individuals and institutions, and any definition of privacy, or private personality, must reflect this plastic duality: sharing and concealment.

It follows that the right of privacy does not deal with some fixed area of personal life that has been immutably ordained by either law, or divinity, or science, or culture, to be off-limits and private. The essence of privacy is no more, and certainly no less, that the freedom of the individual to pick and choose for himself the time and circumstances under which, and most importantly, the extent to which, his attitudes, beliefs, behavior and opinions are to be shared with or withheld from others. The right to privacy is, therefore, a positive claim to a status of personal dignity, a claim for freedom, if you will, but freedom of a very special kind.

Ruebhausen and Brim, *Privacy and Behavioral Research,* 65 Colum.L.Rev. 1184, 1188-89 (1965) (footnote omitted) ; see also Fried, Privacy, 77 Yale L.J. 475 (1967); Parker, *A Definition of Privacy,* 27 Rutgers L.Rev. 275 (1974).

Such a claim is particularly compelling when the material to be disclosed includes communications by a patient to a psychotherapist. Essential to psychotherapy are confidential personal revelations about matters which the patient is normally reluctant to discuss. Frequently, a patient in analysis will make statements to his psychiatrist which he would not even make to the closest members of his family. Slovenko, *Psychiatry and a Second Look at the Medical Privilege,* 6 Wayne L.Rev. 174, 184-85 (1960). Revelations often concern the most intimate and embarrassing details of a patient's life, and their public disclosure may well strip him of much of his own sense of human dignity.

In addition to the value of affording protection to patients' subjective interest in freedom from humiliation, there is a further distinct, but causally related goal of encouraging the psychologically handicapped to seek and fully cooperate in psychotherapeutic counseling.

Lora v. Board of Education, 74 F.R.D. 565, 570-571.

In an early and renowned decision recognizing a privilege for psychotherapeutic communications, the Court of Appeals for the District of Columbia stated:

> The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. *** It would be too much to expect them to do so if they knew that all they say and all that the psychiatrist learns from what they say may be revealed to the whole world from a witness stand.

Taylor v. United States, 95 U.S.App.D.C. 373, 222 F.2d 398, 401 (1955) .

It must be seen that "psychiatric patient," as the Court used the term in 1955, was a generic term for "mental health care recipient." Psychotherapy patients of clinical social workers make, and must make, exactly the same types of revelations to receive exactly the same type of treatment as described in *Taylor*. Their treatment and privacy needs are exactly the same as those of any other psychotherapy patient, and in reason, the law must take the needs of all psychotherapy patients equally seriously and afford them the same protections.

VII.
By reason of well-publicized Illinois law and principles of practice of Employee Assistance Programs, Mary Lu Redmond had an expectation of confidentiality and privacy which should not be disappointed by an inflexible approach to federal procedure. Karen Beyer also had such an expectation and conducted her practice accordingly. The public policy of the State of Illinois should not be ignored or undermined.

Federal Rule 501 does not impose upon the Court a requirement that it follow state privilege law. This does not mean, however, that federal courts should not consider the law of the state in which the case arises in determining whether a privilege should be recognized as a matter of federal law. "A strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy." *United States v. King*, 73 F.R.D. 103, 105 (E.D.N.Y.1976). And where a "state holds out the expectation of protection to its citizens, they should not be disappointed by a mechanical and unnecessary application of the federal rule." *Lora v. Board of Education*, 74 F.R.D. 565 (E.D.N.Y.1977).

"(A state's] view of the matter and the expectations of its professionals and its patients may not be ignored. See, e.g. *United States v. King*, 73 F.R.D. 103, 105 (E.D.N.Y.1976) ; *Apicella v. McNeil Laboratories, Inc.*, 66 F.R.D. 78 (E.D.N.Y. 1975)." *Lora v. Board of Education*, 74 F.R.D. 565, 568 (E.D.N.Y.1977)

Illinois has a strong policy in favor of confidentiality and privilege of mental health records and information. "Where a person makes statements to a therapist in a professional consultation, those statements are privileged." *In re Marriage of Semmler*, 90 Ill.App.3d 649, 413 N.E.2d 502 (1980). The Illinois Mental Health and Developmental Disabilities Act defines "therapist" as:

> * * * a psychiatrist, physician, psychologist, social worker or nurse providing mental health ... services or any other person not prohibited by law from holding himself out as a therapist if the recipient reasonably believes that such person is permitted to do so. Therapist includes any successor of the therapist.

Ill.Rev.Stat. ch. 91½, par. 802 (9).

"Treatment" means an effort to accomplish an improvement in the mental condition or related behavior of a patient. Treatment includes, but is not limited to ... psychotherapy Ill.Rev. Stat. ch. 91½, par. 1-128.

The services provided to Mary Lu Redmond were clearly mental health services. By Illinois law and standards, Karen Beyer is a psychotherapist. Mary Lu Redmond received psychotherapeutic services. Both therapist and patient had an expectation of privacy and confidentiality, and it was on that basis that the services were given and received. It is the public policy of Illinois to encourage and induce people to seek mental health treatment and to protect their privacy rights in connection therewith. *Laurent*, 74 Ill.App.3d at 217, 30 Ill. Dec. 164, 392 N.E.2d 929. The views of the State of Illinois and the reasonable expectations of Karen Beyer and Mary Lu Redmond by reason thereof should not be ignored by this Court.

VIII.
There is a strong community interest in the right sought to be protected.

In general, the community has an ever-growing interest in maintaining the mental health and high functioning of its citizenry. There is widespread concern over joblessness and homelessness, impairment of productivity of workers, and the unbearable social

and economic costs of mental and emotional disturbance or lack of well-being. It is in the best interests of the community that free access be had to psychotherapeutic treatment. Barriers to seeking mental health care must be removed. While psychotherapy and other mental health treatment is increasingly accepted, there still remains a stigma attached to mental illness, and fear of rejection in the community and the workplace if knowledge of mental treatment is made known. For this reason, Illinois and many other states have enacted strong confidentiality and privilege laws.

If the public is aware that disclosures to mental health professionals will remain private and confidential, there is a stronger likelihood that those who require treatment will seek it to enhance their functioning and well-being and relieve their psychic pain. This has a salutary effect on the community at large, which benefits from the increased productivity and contribution of mentally healthy and vigorous citizens. Conversely, if the public believes that psychotherapeutic revelations will be available to the minions of the legal system, much less to the community at large, this must have a chilling effect on their willingness to enter into care. The community cannot afford the consequences.

It must be noted that, in this regard, protective orders cannot help much. A patient makes revelations to a therapist in the context of complete trust and confidentiality. The fact that only a few other persons may be given access to them is not a great comfort; the patient's privacy is still invaded; she is still stripped bare in front of others; she is still humiliated. Further, with the best of intentions and care on the part of a judge issuing the tightest possible protective order, the public is aware of too many instances of leaks and improper disclosures to feel confident with anything less than total protection. No matter the punishment meted out to a miscreant "leaker," the damage to the patient cannot be undone.

IX.
Police officers involved in deadly force incidents often experience grave and debilitating post-traumatic stress symptoms. There is a strong community interest in encouraging police officers to willingly participate in psychotherapy after a critical

incident.

The public is justifiably concerned with the civil rights of persons who have adversary encounters with law enforcement personnel. Public outrage is justified when excessive force is used against individuals whom police are responsible to protect, and firm remedies against infringement upon individual rights are necessary for the protection of our constitutional guarantees. What is often lost in the process is the need to protect those who are hired to protect all of us. Over the past thirty years, law enforcement officers have been required to respond to increasing violence changing their role from "peace officer" to combat level in, e.g., the war on drugs.

> A major hazard involved in being a police officer is the possibility of being involved in traumatic or critical incidents, incidents in which human lives are lost and/or serious injuries are witnessed. involvement in such episodes in highly stressful. (Stratton, 1984). it is not simply that stress symptoms occur but that they may appear with a long time delay. Specific symptoms may include guilt, anxiety, depression, sleep disturbances, flashbacks, and excessive anger. (Blak, 1986; Nielson, 1986; Reiser & Geiger, 1984; Stratton, 1984).
>
> The effects of these stress symptoms can be devastating, both at a personal and a professional level. (Blak, 1986). Therefore, there is considerable interest (Mitchell, 1986b) in finding ways to prevent, or at the very least, alleviate the symptoms. ...

J.T.Reese, J.M.Horn, C. Dunning, eds., *Critical Incidents in Policing*, Washington, D.C., 1990, p. 51.

> Ten years ago, it was estimated that 95% of police officers involved in a shooting would leave police work within five years. (Ayoob, 1981). By 1984, large departments had cut that rate to two or three percent, while small departments were losing two and one half officers for every one involved in a shooting. (McMains, 1986). A major difference between the two outcomes seemed to be the degree to which larger departments formalized

> their department's support for officers involved in traumas. Departments with clearly defined policies and procedures gave their officers a clear message that the officer was important and that the department was going to manage incidents in a way that minimized the effects of trauma. Consequently, it was not only the providing of mental health support that fosters a successful resolution of traumatic stress, it is the support of management as well.

M.J. McMains, "The Management and Treatment of Post Shooting Trauma," Id., pp 279-286.

In very recent years, police departments have begun to develop programs to assist police officers in handling the stress that accompanies their jobs. Over the past decade, some departments, such as the Village of Hoffman Estates, have instituted employee assistance programs to provide mental health services to officers with personal problems. The major barrier to the success of such programs is lack of trust. "Image armor" — denial of problems and symptoms is common among police personnel, who have an image of strength and power to live up to — is also a barrier to seeking mental health services. Law enforcement officers typically resist such aid. A basic key to the success of a police counseling program is establishing the atmosphere of confidentiality and training all personnel to respect the integrity of the service. J. A. Dunne, "Police Counseling Unit to Deal with Critical Incidents," Id. , p. 109. Unless police officers can rely on confidentiality in mental health care delivery, they will not participate in it. This would be a sad loss to the community.

M. Silva, in "The Delivery of Mental Health Services to Law Enforcement Officers," Id., p. 467, expressed it thus:

> Confidentiality. Police officers as any other counselee fear heaving their trust betrayed. Self-disclosure is frequently intimidating to counselees because of the feat of what they may discover about themselves. More intimidating still is the fear that once shared with the counselor, the latter may hold the information against him/her or maybe worse, divulge it. "Do you know anyone in police administration." "Will this information get back to them?"

> "How much of this do you have to report to the insurance company?"

If confidentiality is the *sine qua non* of psychotherapy generally, how much more essential is it in the psychotherapy provided to police officers by their own departments? A mentally healthy, stable police force is a prime asset of a community. Access by police personnel to therapy services is essential. Where, as here, the department has set in place the instrumentality to encourage this access, and has induced officers to avail themselves of therapy by assurances of confidentiality, the community has a great interest in protecting that which was promised. It is well accepted in the Employee Assistance field that without confidentiality, programs will surely fail.

Understanding the need for confidentiality if its Employee Wellness Program was to succeed, the Village adopted a policy of strict confidentiality and promulgated it among its employees. See Exhibit A. If this Court refuses to recognize the need and value of that confidentiality and will not protect it with a privilege, the damage to the Hoffman Estates program will be incalculable — but so will the damage to all police counseling and psychotherapy programs as word spreads among police officers across the country. This is too great a price for the community to pay.

IX.

There has been no showing in this case that the records and information sought from the psychotherapist are relevant or will lead to relevant information, or are probative, or necessary, or that the information cannot be obtained from other non-privileged sources. A weighing of interests requires recognition of the privilege.

In deciding whether a privilege asserted should be recognized, the Seventh Circuit has declared that the particular factual circumstances of the case in which the issue arises must be taken into account.

> The court should "weigh the need for truth against the importance of the relationship or policy sought to be

> furthered by the privilege, and the likelihood that recognition of the privilege will in fact protect that relationship in the factual setting of the case." *Ryan v. Commissioner of Internal Revenue,* 568 F.2d 531,542-3 (7th Cir.1977), cert.denied, 439 U.S. 820, 99 S.Ct. 84, 58 L.Ed.2d 111 (1978).

Memorial Hospital for McHenry County v. Shadur, 1981, 664 F.2d 1058, 1061.

In this case, public and private interests must be weighed, including those of:

> the federal government in protecting the civil rights of its citizens and redressing their grievances;
>
> the State of Illinois in encouraging mental health treatment and the wellness of its citizenry;
>
> the Village of Hoffman Estates in requiring and encouraging its employees (and particularly its public saf ety employees) to participate in therapy and its wellness program;
>
> government, industry, union and individual employee interests in the viability of the Employee Assistance Programs which are a valuable asset to the country;
>
> the interests of the plaintiff in seeking damages for a perceived wrong;
>
> the privacy and confidentiality interests of Mary Lu Redmond.

The Federal Rules of Evidence were designed to "secure fairness in administration" and permit the development of all relevant facts before the trier "to the ends that the truth may be ascertained and proceedings Justly determined." Rule 102. (emphasis added) "Just determination" involves the recognition of such privileges as are required under the circumstances of a case to balance the public and private interests involved.

A four-prong analysis has been suggested for balancing the various state and federal interests to determine whether, and to what extent, the federal common law of privilege would recognize

a state evidentiary privilege against disclosure:

> whether state courts recognize the privilege
>
> whether the state's asserted privilege is intrinsically meritorious
>
> whether the privilege should be sedulously fostered
>
> whether the injury that would inure to the relationship by the disclosure of the communication is greater than the benefit thereby gained

In re Hampers, 651 F. 2d 19, 22-23 (1st Cir. 1981); *Sabree v. United Broth. of Carpenters & Joiners of America, Local No. 33,* 126 F.R.D. 422, 425-426 (D.Mass.1989).

The fundamental factor in discoverability and admissibility must be relevance.

> "Relevant evidence" means evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action "more probable ... than it would be without the evidence." Rule 401.

The issue in this case is whether the police officer used excessive force and thereby infringed the constitutional rights of the decedent. "The question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Connor et al.,* 490 U.S. 386, 109 S.Ct. 1865 (1989). What is relevant is what happened at the scene of the shooting. There are witnesses to testify to that. There is a trier of fact to determine the weight and credibility of that evidence. Mental health records are not necessary to establish what happened. See *Jennings v. D.H.L. Airline,* 101 F.R.D. 549, 551 (N.D.Ill. 1984).

Access to Mary Lu Redmond's psychotherapist or her records is just not necessary to establish any fact relevant to this case. on the other hand, such access would invade her privacy and intrude on the confidentiality of her therapy relationship — all contrary to what had been represented and promised to her by the State of Illinois and the Village of Hoffman Estates when she entered into

therapy. Such access would send a message to the citizens of the State of Illinois that they cannot rely upon the protections afforded them by their legislature and courts who have encouraged them to participate in mental health treatment by assuring them of privacy, confidentiality and privilege except under certain clearly defined exceptions, none of which apply in this case. It would discourage participation in treatment which is highly valued by the community.

It would erode the credibility of the Village of Hoffman Estates as an employer and undermine its laudable efforts to maintain a mentally healthy, high-functioning workforce -- particularly important to the community where its public safety officers are involved. Not only would the Employee Wellness Program of the Village of Hoffman Estates be adversely affected, but also Employee Assistance and Wellness programs and industrial and community mental health programs all over the country.

In *In re Production of Records to Grand Jury,* 618 F.Supp.440, the District Court for Massachusetts stated:

> *** (T]his court asks whether the state social worker-patient privilege is "intrinsically meritorious." The court so rules. The very confessional required for a patient's cure should not be lightly used to cause him harm. Between a social worker and a patient, the avenues of painful and even embarrassing disclosures must not be obstructed by fear and mistrust. With reason and from experience, this court respects both the legislative policy evident in Mass.Gen.Laws. 66A, 112, § 135, and 119, § 135, and the judicial process made manifest in the decisions of the courts of the Commonwealth. ... [T]his court can see no reason to second-guess the Massachusetts legislative determination that the patient-social worker relationship should be "sedulously fostered." At this point the (petitioner] offers little to substantiate the benefit to be gained by ordering the Department to disclose its [social worker's] record. only an adequate affidavit could provide such evidence. Absent this, the court concludes that the potential for injury to the social worker-patient relationship could well be greater than the benefit gained by the

> [petitioner].

618 F.Supp. 440, 443.

The citizens of Illinois have been led by the Illinois legislature and courts to have a justifiable expectation of confidentiality and privilege of mental health records and information. Mary Lu Redmond and the other employees of the Village of Hoffman Estates have been led by representations made to them by their public employer that their records and information of treatment received in the Employee Wellness Program would not be disclosed. These persons have reasonable, justifiable confidentiality, privacy and privilege expectations which merit consideration in the court's determination as to whether or not to recognize a privilege in this case.

CONCLUSION

This is admittedly not a simple matter, and Karen Beyer respectfully urges the Court not to discount the need and propriety of recognizing a psychotherapy privilege in this case simply on the basis of her professional discipline. She urges the Court to weigh the competing interests in light of the needs of psychotherapy patients, the value of psychotherapy to the community, and the value of Employee Assistance and Wellness Programs to employees, the economy, and society as a whole. Karen Beyer requests that the Court reconsider its previous ruling and recognize a privilege in this case.

Respectfully submitted,

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by */s/ Johathan Nye*
one of her attorneys

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

PLAINTIFFS' MOTION TO COMPEL ANSWERS TO DEPOSITION QUESTIONS

Pursuant to Rule 37 of the Federal Rules of Civil Procedure, plaintiffs, by counsel, move the Court to compel witness Karen Beyer to answer: (1) questions within the scope of the Court's ruling of June 23, 1992 and (2) questions which relate to the memory of Officer Redmond and her ability to recall accurately the incident of June 27, 1992, when she shot and killed plaintiffs' decedent, Ricky Allen. Plaintiffs also request the Court to compel the production of notes and documents prepared and maintained by Beyer concerning conversations that Beyer had with Redmond.

Grounds for these requests are as follows:

1. On June 23, 1992, the Court ruled that Karen Beyer, a social worker employed by the Village of Hoffman Estates, could be deposed "only with respect to the disclosures made to her by Ms. Redmond of the incident of the day that relate to the matter that is at issue in this lawsuit." (Tr., 6/29/92, 11, attached.)

2. Beyer's attorney has construed the Court's order in an artificial and unreasonable manner and precluded any inquiry into matters concerning Beyer's recollection, bias and credibility. Beyer was instructed not to reveal whether she had reviewed documents before coming to the deposition (Beyer Dep. 18); whether she made any notes summarizing what Redmond had said about the incident (Beyer Dep. 24-25, 58); to whom she had spoken, besides her attorney, about the deposition (Beyer Dep. 28); whether she had been paid by Redmond for administering therapy (Beyer Dep. 34); whether she knew what Redmond had said when deposed (Beyer Dep. 37); and how many-times she had seen Redmond (Beyer Dep. 49).

3. Beyer also refused to produce her records which show when and how often she met with Redmond, as well as her records that set out statements made by Redmond about the shooting incident. (Beyer Dep. 17-18.)

4. Beyer should be instructed to answer the questions referred to in paragraph 2 above and to produce the records described in paragraph 3. Appropriate sanctions should be imposed for the unreasonable position taken by Beyer's attorney in construing the Court's ruling.

5. In addition to being ordered to answer the recollection, bias, and credibility questions referred to above, Beyer should be ordered to answer questions that are relevant to Redmond's ability to recall her actions on the day she shot and killed Ricky Allen. As explained in the attached letter from Dr. Robert Shelton, additional information, that is known to Beyer, would be relevant to whether Redmond is presently accurately recalling the incident. As Dr. Shelton explained, "[a] review of therapy notes, candid responses from [Redmond's] therapist, or statements based on trauma memory . . . could answer these questions [about the nature or type of Officer Redmond's memory]."

Respectfully submitted,

/s/ Kenneth N. Flaxman
an attorney for plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

PLAINTIFFS' MOTION FOR SANCTIONS

Pursuant to Rule 37 of the Federal Rules of Civil Procedure, plaintiffs, by counsel, move the Court to impose appropriate sanctions on defendant MaryLu Redmond for her evasive and incomplete answers to questions concerning her conversations with Karen Beyer.

Grounds for this motion are as follows:

1. In prior proceedings, the Court directed defendant Redmond to answer questions concerning her conversations with Karen Beyer that touched on the shooting of Ricky Allen. The Court also ordered Beyer to produce her notes that summarized statements that Redmond made about the incident.

2. At her deposition (a sealed copy of which is tendered with this motion), Redmond claimed that she could not recall:

a. whether she ever told Beyer that she had shot someone to death (Dep. 365);

b. whether she had told Beyer that she had drawn her gun (Dep. 366);

c. whether she ever discussed with Beyer her belief that she was justified in shooting Ricky Allen (Dep. 386);

d. whether she ever told Beyer why she felt she had to shoot Ricky Allen. (Dep. 419)

3. The documents recently produced by Beyer (tendered under seal with this motion) show that in their first meeting, Redmond shared with Beyer her opinion that the shooting was justified. (Diagnostic Profile, July 9, 1991.) The documents also show that Redmond discussed with Beyer her inability to recall pulling the trigger (Progress Notes, November 13, 1991), and that Redmond

explained to Beyer the placement of people at the shooting scene. (Progress Notes, December 2, 1991.)

4. Rule 37(a)(3) states in part that "an evasive or incomplete answer is to be treated as a failure to answer." This rule is consistent with Judge Learned Hand's observation in United States v. Appel, 211 F.Supp. 495, 496 (D.N.Y. 1913):

> A court, like anyone else who is in earnest, ought not to be put off by transparent sham, and the mere fact that the witness gives some answer cannot be an absolute test. For instance, it could not be enough for a witness to say that he did not remember where he had slept the night before, if he was sane and sober, or that he could not tell whether he had been married more than a week.

5. "[T]estimony false and evasive on its face is the equivalent of refusing to testify at all." *Richardson v. United States*, 273 F.2d 144, 147 (8th Cir. 1959). As in *Martin-Trigona v. Gouletas*, 634 F.2d 354 (7th Cir. 1980), Redmond's claimed inability to recall "was an attempt to avoid answering the questions." Id. at 357.

6. Sanctions are required when, after being ordered to answer questions, a party refuses to comply with that order by feigning an inability to recall. Plaintiff suggests that the appropriate sanction is to bar Redmond from testifying at trial that she recalls drawing her firearm and shooting Ricky Allen to death.

Respectfully submitted,

/s/ Kenneth N. Flaxman
an attorney for plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

**DEFENDANTS' RESPONSE TO
PLAINTIFF'S MOTION FOR SANCTIONS**

NOW COME the Defendants, VILLAGE OF HOFFMAN ESTATES and MARYLU REDMOND, by their attorneys, Segal, McCambridge, Singer & Mahoney, Ltd. and respond to Plaintiffs' Motion for Sanctions as follows:

I. Plaintiffs Have Not Cited Any Case Law Which Supports Their Requested Relief in a civil case.

In their motion, plaintiffs seek to bar the testimony of MARYLU REDMOND based on what they conclude are evasive answers to questions asked at her deposition. Both cases relied upon by the Plaintiffs, *Richardson v. United States*, 273 F.2d 144 (8th Cir. 1959) and *United States v. Appel*, 211 F.Supp. 495 (D.N.Y. 1913) establish a test for false and obstructive testimony in criminal contempt cases, but not civil cases, such as we are faced with. Such a test is followed when courts "consider the power to punish for criminal contempt as an inroad upon the procedural safeguards of the Bill of Rights." *Collins v. United States*, 269 F.2d 745-50 (9th Cir. 1959). Plaintiffs have not supplied this Court with any case law which grants the type of relief they request in a civil case.

Plaintiffs also rely on *Martin-Trigona v. Gouletas*, 634 F.2d 354 (7th Cir. 1980), where an individual was confined to a correctional center until he answered certain questions concerning his own assets. There, the witness attempted to avoid answering such questions, and invoke the privilege of self-incrimination as to an underlying lawsuit. Id. at 356. The court gave the witness an opportunity to explain how such answers would incriminate himself, found that no such situation existed, and ordered him to answer certain questions. In response to those questions, the

witness claimed lack of knowledge, which the court found to be in bad faith, thus holding him in contempt. Id. at 356. This is an entirely different situation from MARYLU REDMOND. Ms. Redmond never refused to answer any questions regarding the facts of the shooting of Ricky Allen. In fact, Ms. Redmond gave a rather detailed account of the events of June 27, 1991, including:

(1) That she shot someone to death. (Redmond Dep. pg. 39.)

(2) That she drew her gun at Ricky Allen. (Redmond Dep. pg. 208.)

(3) That her actions were justified. (Redmond Dep. pg. 313-314.)

(4) That she felt she had to shoot Ricky Allen to save another person's life. (Redmond Dep. pg. 151-153.)

Ms. Redmond has never attempted to avoid answering the questions of Plaintiffs' counsel, except when directed by her own attorney. Ms. Redmond has confirmed that the facts of the shooting have not changed, and her memory of the incident has not changed. (Redmond Dep. pg. 360.) It is only when Plaintiffs' counsel began asking specific questions regarding conversations between MaryLu Redmond and her counsellor, Karen Beyer, time and time again, Ms. Redmond could not recall the substance of these conversations. (Redmond Dep. pg. 363-382.) Rather than perjure herself by speculating as to what was contained in the conversations between herself and Karen Beyer, almost one full year earlier, she answered the questions honestly and to the best of her ability. Plaintiffs have not proved anything contrary to this. Further, plaintiffs have not presented any case law or other evidence which would allow this Honorable Court to grant the relief they seek.

II. Plaintiffs' Attempt to Impeach the Recollection of MaryLu Redmond is Misplaced

As mentioned earlier, MaryLu Redmond has recited, several times, the facts of the shooting in a consistent and reliable manner; but Plaintiffs still contend, stubbornly and without basis, that Ms. Redmond is "feigning an inability to recall" the facts of the shooting incident which is the basis of their lawsuit. Plaintiffs' have

attempted to side track the court as to the material issues in this case, as framed by the plaintiff's Complaint, namely: Whether a violation of Ricky Allen's civil rights occurred due to Ms. Redmond's use of deadly force; Whether Ms. Redmond's actions constituted a wrongful death of Ricky Allen; and Whether a violation of the Ricky Allen's childrens' civil rights occurred due to Ms. Redmond's use of deadly force.

Plaintiffs' are attempting to interject a purely collateral and irrelevant source of information, namely Karen Beyer. All of Ms. Redmond's visits to Ms. Beyer occurred after the shooting. If these meetings had not occurred, the issues in the case would not change. The substance of the conversations between Ms. Redmond and Karen Beyer do not, and can not affect the issues before this court. Ms. Redmond has not denied that the visits to Karen Beyer occurred, or that the facts of the shooting were discussed at these meetings.

Ms. Redmond has merely made a good faith attempt to answer the questions posed by plaintiffs' counsel, to the best of her recollection. No basis for creating a new issue in the case exists simply because plaintiffs' counsel chooses not to accept or believe the answers he received at deposition.

In Illinois, impeachment is to be used solely to attack the credibility of a witness, not as substantive proof of an issue, and the credibility of the individual remains a question of fact for the jury. *Corneiller v. School District 152*, 62 Ill. Dec. 372, 378 N.E.2d 1247 (1st Dist. 1978). Plaintiffs' attorneys are attempting to suggest to this court that their own feelings and suspicions should be construed as the decision of a jury as to the credibility of Ms. Redmond's testimony. This, of course, is not how our legal system operates with respect to the impeachment of testimony. Plaintiff's motion must therefore be denied. If credibility of a witness were to be determined by the attorney asking the questions at a deposition, there would never be the need for anyone to testify at trial; everyone would be lying.

WHEREFORE, Defendants, VILLAGE OF HOFFMAN ESTATES and MARYLU REDMOND, respectfully request that this Honorable Court enters an order denying Plaintiffs' Motion in its entirety, and further finds that no sound basis exists for the

filing of said motion, thus granting Defendants their costs, including reasonable attorneys fees, incurred in having to respond to and appear on said motion.

/s/ Robert E. Wilens
an attorney for defendant

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

PLAINTIFFS' SECOND MOTION TO COMPEL ANSWERS TO DEPOSITION QUESTIONS AND MOTION TO MODIFY ORDER OF DECEMBER 10, 1992

Plaintiffs, by counsel, move the Court to direct deponent Karen Beyer to answer questions concerning what defendant Redmond told Beyer about the nature of Redmond's pre-shooting relationship with plaintiffs' decedent Ricky Allen. In addition, because of potential perjury that was revealed at the second installment of Beyer's deposition, plaintiffs request the Court to modify its order of December 10, 1992 a) to permit an unrestricted inquiry into statements made by Redmond to Beyer and b) to require the production of all of Beyer's notes.

Grounds for these requests are as follows:

1. This case arises out of the fatal shooting of plaintiffs' decedent Ricky Allen by Hoffman Estates police officer MaryLu Redmond. Redmond's defense is that she acted reasonably when she saw Ricky Allen chasing another man with a knife.

2. Redmond has claimed that, before shooting Ricky Allen, she had not met any members of plaintiff's family (Redmond Dep. 318) and that she did not recognize Ricky Allen. (Redmond Dep. 305.) Redmond has also claimed that at the time of the shooting, she was not suffering any stress in personal relationships. (Redmond Dep. 194, 273). Each of these claims is relevant to the credibility of Redmond's reasonableness defense; each of these claims appears to be false.

3. At the second installment of her deposition, Karen Beyer stated that Redmond had told her that she had met Ricky Allen before killing him (Beyer Dep., Jan. 26, 1993, 32-33):

Question: Did Miss Redmond ever tell you that she [33] knew Ricky Allen before she killed him?

Beyer: She told me she had met him.

Q: Did she tell you how she had met him?
Beyer: Yes.

4. On the advice of counsel, Beyer refused to state how Redmond had met Ricky Allen. (Beyer Dep., Jan. 26, 1993, 38.)

5. Beyer also stated that Redmond told her that she had been having "a relationship problem" at the time she shot Ricky Allen (Beyer Dep., Jan. 26, 1993, 28):

Question: Did Miss Redmond discuss with you that she was having a relationship problem at or about the time that she shot Ricky Allen?
Beyer: Yes.

6. Again, on the advice of counsel (Beyer Dep., Jan. 26, 1993, 30), Beyer refused to provide any further details about the "relationship problem."

7. These two areas — Redmond's relationship with Ricky Allen before she shot him and her emotional state at the time of the shooting — are among those that could be relied on by an expert in offering an opinion on the reasonableness of Redmond's actions and which could be weighed by a jury in assessing the reasonableness of the shooting. These two areas involve matters that are relevant to this lawsuit and Beyer should be directed to answer follow up questions concerning these areas.

8. Beyer should also be directed to produce all of her notes for inspection. At the second installment of her deposition, Beyer explained that she would record the "major themes of the conversation" (Beyer Dep., Jan. 26, 1993, 11) after each meeting with Redmond. Beyer has produced three pages of heavily redacted notes; based on Beyer's recent revelations that Redmond had met Ricky Allen before killing him and that Redmond was having personal problems at the time of the shooting, it is likely that additional relevant information is contained in the interview notes.

9. In addition, plaintiffs should be permitted to depose Beyer without restriction as to subject matter. Based on Beyer's recent revelations, it is likely that further inquiry of Beyer will reveal additional information relevant to the reasonableness of Redmond's

actions.

It is therefore respectfully requested that the Court:

A. Direct deponent Karen Beyer to answer questions concerning what defendant Redmond told Beyer about the nature of Redmond's pre-shooting relationship with plaintiffs' decedent Ricky Allen;

B. Modify its order of December 10, 1992

   i. to permit an unrestricted inquiry into statements made by Redmond to Beyer and

   ii. to require the production of all of Beyer's notes.

Respectfully submitted,

/s/ Kenneth N. Flaxman
an attorney for plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CARRIE JAFFEE, as Special Administrator for Ricky Allen, Sr. and LECHIA ALLEN, Next Friend of RICKY ALLEN, JR. and BRANDON ALLEN

Plaintiffs,

No. 91 C 4153 *v.*

MARYLU REDMOND, Hoffman Estates Police Officer and VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Defendants.

EXCERPT OF PROCEEDINGS
BEFORE THE
HONORABLE MILTON I. SHADUR, Judge
February 5. 1993

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[2]

THE COURT: That's a question that — I read the earlier pages as well — and that is a question that was not permitted to be answered in the course of the deposition.

Mr. Rogus, we have a difference of perception about the appropriate areas of inquiry in a situation in which, as I say, where ever in 1983 actions-the issue of motive, the issue of state of mind, is obviously a critical factor. And where — you know the nature of the matter is that we do not perform trepanning operation — you don't saw off the top of someone's head and try to peer inside — all we can do is to deal with the objective facts as best we can ascertain them. And it seems to me that Mr. Flaxman has made a sufficient showing here to entitle him to the relief that he seeks.

I am going to continue to maintain that's to be on a strict "counsels' eyes only basis," so that nothing is going to go either — even for Mr. Flaxman to his client — but certainly [7] he is

entitled as part legitimate discovery to engage in this.

MR. ROGUS: Your Honor, he's for I believe documentary production as well as additional testimony —

THE COURT: Right.

MR. ROGUS: Is the scope of your ruling going to now encompass the documentary evidence —

THE COURT: Yes.

MR. ROGUS: — that we reviously discussed?

THE COURT: The notes as well. Right.

MR. ROGUS: And for purposes of my advising Ms. Nye, are we talking about the entire set of notes

THE COURT: Yes.

MR. ROGUS: With no redactions?

THE COURT: Yes. I think that we can have sufficient confidence in Mr. Flaxman in that respect that it is not going to be the subject of permitting him to roam around in matters that are outside the scope of the review that I had expressed, you remember the first time, that we confronted this issue. But the point is that redaction is a one-sided activity, and I am not prepared to give effectively Carte Blanche in terms of how and what to redact to the author of those notes, or to anybody else.

So the answer is "Yes." And Mr. Flaxman can then resume that deposition — the depositions — based on that.

Now I suppose what I ought to do is set a next status [8] date. And I would hope that if we set it maybe four weeks out that should be enough time to have gotten through all of this, unless that's a problem. is that all right? * * *

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

**PLAINTIFFS' MOTION TO
IMPOSE SANCTIONS ON DEFENDANT REDMOND**

Pursuant to Rule 37 of the Federal Rules of Civil Procedure, plaintiffs, by counsel, move the Court to impose appropriate sanctions on defendant MaryLu Redmond for causing Karen Beyer to refuse to comply with the Court's order of February 3, 1993.

Grounds for this motion are as follows:

1. In its order of February 3, 1993, the Court directed Karen Beyer to produce, for counsel's eyes only, her unredacted notes of conversations she had had with defendant Redmond. The Court also ordered Beyer to answer questions about statements made by Redmond concerning how she had met Ricky Allen before she shot him and about the "relationship problem" she was having when she shot Ricky Allen.

2. Following entry of the February 3rd order, Beyer, who is the Director of Health and Human for defendant Hoffman Estates, has come to be represented by new counsel. Beyer's new attorney has represented to counsel that Beyer will not produce any documents "absent the express authorization by MaryLu Redmond to do so." Beyer's counsel goes on to state that Beyer will provide "no documents of any kind other than the previously authorized notes/documents relating to the facts, or relating to MaryLu Redmond's statement of the facts, concerning the incident/occurrence of June 27, 1991 which is at issue in the subject litigation." (Letter from William Barasha, March 3, 1993, attached.) (emphasis supplied)

3. A fair reading of Mr. Barasha's letter is that defendant Redmond had at one time expressly authorized Beyer to release notes and documents and that Redmond has now instructed Beyer to refuse to comply with the Court's order. Such conduct should not

be tolerated and appropriate sanctions should be imposed.

Respectfully submitted,

/s/ Kenneth N. Flaxman
an attorney for plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

MOTION TO RECONSIDER

NOW COME DEFENDANTS, MARYLU REDMOND and VILLAGE OF HOFFMAN STATES, by their attorneys, Segal, McCambridge, Singer & Mahoney, Ltd., and move this Honorable Court to reconsider and to vacate its order entered on April 6, 1993, and in support of said motion, state as follows:

1. On April 6, 1993, this Court granted Plaintiffs' Motion for Sanctions against Defendant, MARYLU REDMOND for causing Karen Beyer to refuse to comply with this Court's order of February 3, 1993.

2. Specifically, this Court held, in part, that "Defendant, REDMOND will be precluded at trial from testifying as to her version of the events in which she shot Ricky Allen, because she and Defendant HOFFMAN ESTATES have blocked the Plaintiffs from effective cross-examination on that subject." (Transcript of Proceedings on April 6, 1993, p. 5-6.) (A copy of those proceedings are attached as Exhibit A.)

3. In response to defense counsel's question seeking clarification of the basis for the Court's ruling at that hearing, the Court pointed to "a combination of two things," by stating that REDMOND gave "less-than-credible responses to the inquiries about her recollection of the information that she provided to Karen Beyer ...", as well as "her combined failure and refusal to take any action from the outset that would lead to the provision of these materials by way of discovery." (Transcript of Proceedings on April 6, 1993, p. 7.)

4. On April 8, 1993, the Court, issued a supplemental memorandum regarding its ruling of April 6. (A copy of the Memorandum is attached as Exhibit B.)

5. In the Court's Memorandum, the court identified that only Karen Beyer had "flouted this Court's order to answer questions in her deposition," and that REDMOND's violation was limited to her "non-compliance with her discovery obligations under Federal Rule of Civil Procedures 37", which the Court characterized as "conduct ,by REDMOND that has interacted with Beyer's actions to thwart Plaintiffs, legitimate efforts to obtain needed discovery." (Memorandum of Court, April 8, 1993, p. 2.)

5. Defendants contend that REDMOND has not violated any Court Orders, at no time instructed or even encouraged Karen Beyer to violate any Court Orders, and has not been guilty of any misconduct which merits the drastic sanction imposed by this Court. Accordingly, the Court should reconsider its order of April 6, 1993, and vacate its barring the trial testimony of REDMOND as to her version of the event in which she shot Ricky Allen. As will be discussed below, nearly eight months have now passed since this Court's ruling. Based upon information provided to defense counsel, there still has been no finding of contempt entered by any judicial officer against Karen Beyer. This Court did not specifically enter such a finding in April, but instead referred the matter to the United States Attorney' "for consideration of possible prosecution as criminal contempt." Given this Court's view of the "interaction" of the conduct of Ms. Redmond and Ms. Beyer, and the absence of any finding to date of actual criminal contempt on the part of Ms. Beyer, it is manifestly unfair, unwarranted, and unconstitutional for this Court to maintain the position that Ms. Redmond be barred from testifying at trial.

ARGUMENT

I. THE ACTIONS OF MARYLU REDMOND OR ANY OTHER INDIVIDUAL DO NOT SUPPORT THE SANCTIONS LEVIED BY THIS COURT IN ITS ORDER OF APRIL 6, 1993.

A. The Actions of Karen Beyer Should Not Be Used As A Basis For Sanctioning MARYLU REDMOND Since There Has Been No Finding Of Contempt As Against Karen Beyer.

The holding of this court in April, 1993, concentrated on two distinct, yet ultimately intertwined issues. The first, as mentioned *supra,* was the propriety of barring the testimony of MARYLU REDMOND. The second involved the referral of Karen Beyer's actions to the United States Attorney for consideration of possible prosecution as criminal contempt under Federal Rule of Criminal Procedure 42(b). As a basis for barring Ms. REDMOND's testimony, the Court has concentrated not only on Ms. REDMOND's own inability to remember, but also MS. Beyer's "willful flouting of the Court's orders and authority." (Transcript of Proceedings, April 6, 1993, p. 3.)

On December 10, 1992, this Court heard live testimony from Ms. REDMOND. A copy of those proceedings is attached as Exhibit C. At the conclusion of her testimony, the Court "did not find that what has been said by Ms. REDMOND today is entirely believable." (Transcript of Proceedings of December 10, 1992, p. 43.) However, the Court further stated that it was "reluctant" to characterize that as the "kind of wilfulness that calls for a dramatic sanction -- ultimate or nearly ultimate sanction -- of the type that's been asked for on behalf of the Plaintiff. The notion of foreclosing Ms. REDMOND's opportunity, for example, to testify in connection with this trial, is a notion that I think is inappropriate." (emphasis added) (Transcript of Proceedings, December 10, 1992, p. 43.) Given this pronouncement by the Court as of December 10, 1992, something must have occurred between December 10, 1992, and April 6, 1993, which represented the type of "willfulness that calls for a dramatic sanction" and acted to convince the Court that this previously "inappropriate" sanction was now merited. However, Defendants contend that it was no act of Ms. REDMOND which "broke the camel's back," since her involvement with the Court at that point had been completed, and the Court had already articulated the inappropriateness of a dramatic sanction, even though the Court did not entirely believe the defendant.

Instead, the only possible precipitating event or events were the decisions and/or actions of Karen Beyer. As recited in the Court's Memorandum of April 8, 1993, violating a Court Order "was the only nature of Beyer's offense, for she had flouted this Court's order to answer questions in her deposition." (See Memorandum, Exh. B, p. 2.) The Court then referred to Ms. REDMOND's non-

compliance with discovery obligations under Federal Rule of Civil Procedure 37, and how that non-compliance "interacted" with Ms. Beyer's decisions. The Court must be referring to Ms. REDMOND's failure to authorize Ms. Beyer to disclose any and all records in her possession regarding their meetings. However, Defendants disagree with the insinuation that Ms. REDMOND had anything to do with Ms. Beyer's independent decisions.

At hearing in open court, Ms. REDMOND stated that at no time, had she ever told Karen Beyer that she was not to produce the documents as required by the Court. (Transcript of Proceedings, March 8, 1993, p. 5-6.) (A copy of those proceedings are attached as Exhibit D.) Further, Ms. REDMOND has never instructed another individual or entity to convey to Ms. Beyer that she should not obey the Court's Order. (Transcript of Proceedings, March 8, 1993, p. 6.) Notwithstanding, it would be wholly irrelevant even if Ms. REDMOND had done any or all of the above-mentioned acts, thus authorizing Ms. Beyer to comply with Court's Order, since Ms. Beyer testified at those same proceedings that such acts would not conclusively persuade her to comply. (Transcript of Proceedings, March 8, 1993, p. 13.) She also testified that she would not turn the records over to a HOFFMAN ESTATES official, even if ordered to do so by her employer. (Transcript of Proceedings, March 8, 1993, P. 32.) The overall effect of Ms. Beyer's testimony affirmatively shows that neither Ms. REDMOND nor HOFFMAN ESTATES had any control over the decision making process or actions of Ms. Beyer in this particular regard.

Nonetheless, from those proceedings, this Court concluded that the actions of Ms. Beyer, although insufficient for the Court to then and there find Ms. Beyer in contempt of court, were sufficient to impose a dramatic sanction upon Ms. REDMOND. It must be noted that, to date, the attorneys for Defendants have directed inquiries to the United States Attorney, and to Mr. David Americus, the attorney representing Karen Beyer in that matter, regarding the status of the criminal contempt issue, and have been informed that no contempt charges or recommendations have been filed against Karen Beyer for her actions in this matter.

Therefore, Defendants urge that the Court reconsider its ruling of April 6, 1993, vacate its previous order and allow Ms.

REDMOND to testify at trial of this matter, since no formal finding of contempt has been issued, nor have formal charges been entered against Karen Beyer.

B. Without The Opportunity To Testify, Ms. REDMOND Cannot Receive A Fair Trial.

On April 6, 1993, this Court imposed a dramatic sanction upon MARYLU REDMOND, namely barring her testimony at trial as to "her version of the event in which she shot Ricky Allen." Without the ability to testify on her own behalf, regarding her own, perceptions, actions and justifications for her actions, the jury will be deprived of hearing all of the facts and unquestionably denied an opportunity to consider all the relevant evidence bearing upon the issue as to whether Ms. Redmond's actions on June 27, 1991 were objectively reasonable.

The failure to allow Ms. REDMOND to testify would also deprive her of her right to a trial by jury, a right guaranteed by the Seventh Amendment to the United States Constitution in cases involving legal rights as opposed to equitable rights. *A.G. Becker-Kipnis & Co. v. Letterman Commodities, Inc.*, 553 F.Supp. 118 (N.D. Ill. 1982). Should Ms. REDMOND be prevented from testifying before the jury, it cannot be said that she has had her day in Court and has received a fair trial. Although she would be in the courtroom, these will undoubtedly be confusion and considerable doubt generated by the absence of her eyewitness testimony, much to her prejudice. To avoid this possible Constitutional issue and insure a fair trial, Ms. REDMOND must be allowed to testify regarding the topics previously barred by the Court's Order of April 6, 1993.

II. A DETERMINATION OF CREDIBILITY WITH RESPECT TO MARYLU REDMOND'S TESTIMONY IS NOT TO BE MADE DURING PRE-TRIAL STAGES.

It is well-established that the credibility of a witness is a question of fact for the jury to decide. *U.S. v. Zouras*, 497 F.2d 1115 (7th Cir. 1974). Here, however, the jury will not have the opportunity to make its own credibility determination as to the testimony of MARYLU REDMOND regarding the events leading up to the

shooting of Ricky Allen, since the Court has effectively taken away that basic duty and has substituted, in its stead the Court's own indelible stamp of non-credibility.

Defendants respectfully contend that the barring the defendant's testimony in advance of trial premised, at-least in part, on the Court's own assessment of credibility, was clearly improper, and urge the Court to reconsider and vacate its order of April 6, 1993.

III. CONCLUSION.

Given all of the aforementioned reasons and authorities, Defendants, MARYLU REDMOND and VILLAGE OF HOFFMAN ESTATES, respectfully request that this Honorable Court reconsider its order of April 6, 1993 and enter an Order vacating that previous Order, thus allowing MARYLU REDMOND to testify at trial regarding her account of the events of June 27, 1991.

/s/ Gregory E. Rogus
an attorney for defendant

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CARRIE JAFFEE, as Special Administrator for Ricky Allen, Sr. and LECHIA ALLEN, Next Friend of RICKY ALLEN, JR. and BRANDON ALLEN

Plaintiffs,

No. 91 C 4153 *v.*

MARYLU REDMOND, Hoffman Estates Police Officer and VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Defendants.

EXCERPT OF PROCEEDINGS
BEFORE THE
HONORABLE MILTON I. SHADUR, Judge
December 10. 1993

* * *

[5]

THE COURT: Let me turn to the main aspect of this morning, and that has to do with the motion that I vacate my earlier order about Ms. Redmond. There is no reason that the two you have to be standing up. I expect to deal with this perhaps at a little length, and you may want to make notes and sit down for that purpose. At the — you can sit down.

What the defendants have asked for is that I vacate that April 6th 1993 order in which I precluded the individual [6] defendant Mary Lu Redmond from testifying about her version of the events in which she shot Ricky Allen. And I am going to come to that aspect of the thing in a moment, but first I have to say that this motion seems to reflect that counsel still doesn't get it. There hasn't been any relevant change in circumstances since that order was entered. What I see in this current motion is a continued distortion of what I said during the April 6th hearing and what I wrote in my brief April 8th memorandum.

It was totally within Ms. Redmond's control to provide plaintiffs with the ability to cross-examine her effectively about her version of the events. obtaining information from — and I am now talking about her version of the events as it was very shortly after the occurrence, as contrasted with her version of the events as of the time of the deposition — obtaining information from Ms. Beyer would have been an indirect and not an entirely satisfactory way to derive information on that same subject, but it's one to which the plaintiffs were driven by the purported total lack of recollection on Ms. Redmond's part about what she had told Ms. Beyer.

Incidentally, and very importantly I think, even if Ms. Beyer continued to flout what was a direct court order by stonewalling about what Ms. Redmond had told her, there was nothing to prevent Ms. Redmond from getting that information from Ms. Beyer and providing proper answers to plaintiffs, [7] counsel, rather than persisting in what I observed to be a wholly noncredible purported total failure of recollection.

Now what a busy prosecutorial staff in the United States Attorney's office may or may have decided to do about Karen Beyer, about any possible criminal contempt, is frankly just irrelevant. My view I know differs a bit from that of some of my colleagues. My sense is that it's not for this Court or for any other court to attempt to set priorities for a prosecutor. My own sense is that separation of powers considerations tend to make that unseemly. If the conduct in this case involves or occupies a low priority, or maybe even no priority, in relation to the activities of the United States Attorney's office, which is seriously occupied in a lot of other matters, I would think it frankly quite improper for me to express any level of insistence.

You know, I could do that. I could press. But that's not my sense of what the proper role of a judge is when a matter is referred to a prosecutor for consideration. And accordingly the fact of action or inaction by that office really does not bear upon my evaluation of Ms. Beyer based upon my listening to her and my observing her, just as it doesn't bear on my observation and my evaluation of Ms. Redmond based on her testimony as well as upon the paper record.

Now it's of course true that I expressed reluctance in December of '91 to enter that bar order that I did in April '92. [8] But it's inaccurate to say that nothing in between occurred to change that perspective. Quite the contrary. During that period of time Ms. Redmond had plenty of opportunity to rethink her stonewalling refusal, and she expressly stated during the March 8th hearing — that is part of the material that you have attached — that she would disobey a court order that she authorize Ms. Beyer to produce notes. Clearly Mr. Rogus has forgotten that in saying what he did about the idea that nothing happens, and suddenly the Court seems to change its perspective.

What we had demonstrated (and have had demonstrated) by Ms. Redmond has clearly been a scofflaw position, open defiance. And it is not critical in that sense that Ms. Beyer independently refused to obey and to comply with a court order. So this is not at all a matter of somehow visiting the sins of Karen Beyer on Mary Lu Redmond. Mary Lu Redmond has brought the consequences on herself directly.

Now having said all of that, I take this motion for reconsideration seriously. Indeed, one of the things that has led me to give a lot of hard thought to this is the matter we discussed at our voir dire conference, in terms of how to develop an appropriate statement or instruction for the jury. It is of course awkward to be dealing with matters to the jury other than in an evidentiary form in all events. And I tried to think about reshaping this, and it seems to me that reconsideration is in order as a contrast to an outright bar [9] order, and also consistently with the principle that whenever we deal with this kind of violation we ought to look at the least severe sanction.

Here is what I have conceived in this situation. There may be a better analogy available under well-established law. What has taken place here is the equivalent of the spoliation or destruction of evidence. It's just as though Ms. Beyer's notes on her conversations with Ms. Redmond were destroyed, because those things are just as unavailable to the plaintiffs as though they had been physically destroyed. And this case of course does not involve the kind of question that's frequently encountered in spoliation-of-evidence situations — that is, whether the destruction took place in the

regular course of business and therefore is potentially neutral or innocent, or whether the destruction was in bad faith because of the pendency of the litigation. In this case the effective equivalent of destruction of evidence is inextricably linked to, and is in the teeth of, this lawsuit and the flouting of the rules of procedure and court orders.

Now there are lot of cases that deal with the more conventional type of spoliation to which this is analogous. And I believe that the issue may be better dealt with by permitting Ms. Redmond to testify to her version with full right of cross-examination, including the fact of her post-occurrence consultations with Ms. Beyer, when those occurred, the fact that [10] Ms. Redmond discussed with Ms. Beyer what happened during the incident, and with the jury then instructed that the evidence — well, that Ms. Redmond and the Village have refused to make available to plaintiffs — and of course that means to make available to the jury as well — evidence about what Ms. Redmond said during those conferences with Ms. Beyer. And then, in accordance with the established rule of law, that the jury is entitled to draw the adverse inference that the withheld evidence would have been unfavorable to Ms. Redmond and the Village.

Now I took a look yesterday at case law on this, and I found two Seventh Circuit cases of recent vintage — and there may be more, by the way, because they cite back to others of course — but these two particularly that expressly apply and uphold just such an inference. one of those is the well-known case of Brown & Williamson Tobacco Corporation against Jacobson, 827 F.2d 1119. At 1134, the Court says:

> "A court and a jury are entitled to presume that documents destroyed in bad faith while litigation is pending would be unfavorable for the party that has destroyed the documents."

Earlier this year Judge Posner said in a case Partington against Broyhill Furniture Industries, Inc. 999 F.2d 269 at 272 (Seventh Circuit, 1993) — by the way, one of the cases in which he talked about the problem of having to [11] determine under what circumstances the destruction took place. He said:

> "But if, being sensitive to the possibility of a suit, a company then destroys the very files that would be expected to contain the evidence most relevant to such a suit, the inference arises that it has purged incriminating evidence."

What I am are ruling here, and as really a replacement for this idea of a bar, serves I think both reasons for drawing that inference. Let me just read to you from a case from another Circuit. It's a First Circuit 1982 case, Nation-Wide Check Corporation against Forest Hills Distributors, and I found in a Ninth Circuit 1991 case being quoted. That's Akiona against the United States, 938 F.2d 158 at 161. Here is what the Nation-Wide case said:

> "The adverse inference is based on two rationales, one evidentiary and one not. The evidentiary rationale is nothing more than the common sense observation that a party who has noticed that a document is relevant to litigation and who proceeds to destroy the document is more likely to have been threatened by the document than is a party in the same position who does not destroy the document .
>
> . .
>
> "The other rationale for the inference has to do with its prophylactic and punitive effects. Allowing the trier [12] of fact to draw the inference presumably deters parties from destroying relevant evidence before it can be introduced at trial."

Again I emphasize these cases of course talk about the more frequently-encountered situation of destruction. But there isn't any question at all that to put these things into a sealed isn't any question at all that to put these things into a sea box, withhold them both from plaintiffs, counsel and from the jury, is the effective equivalent of the destruction of those documents. They do not exist, unfortunately, so far as this trial is concerned.

Now having said all of this, I have to confess one other thing to you — and that is, what I have not done is to locate a jury instruction that's tailored to this principle What I did do, having done this part of the research myself, was to ask my clerk to do some looking in that respect. But Devitt and Blackmar was not of

any help. The things that I keep in chambers, which are all of the different circuits, published books on standard jury instructions, really didn't provide anything. And as you know if you've attempted to do research, jury instructions are very hard to research quickly through the use of LEXIS and Westlaw. You know, the language that tends to be used is not that readily recaptured. Accordingly I am going to leave that search to you people.

But I want both sides to understand that what I have done here is to shape something that I think is the least severe [13] sanction that can be devised that is directly appropriate to the course of conduct that's involved, and something that apprises the jury both fairly and accurately about the nature of the conduct and the fact that it can draw an inference from it.

And accordingly I am granting the motion to reconsider in the limited respect that I have just identified. I am not doing what the defendants wanted, which was to have Ms. Redmond basically able to tell her story without the jury understanding that there has been an avenue of evidence that has been foreclosed to the plaintiffs. And the jury is entitled to know that can properly give rise to an inference that what has been concealed would have been unfavorable. And plaintiffs' counsel will have plenty of opportunity in the course of argument — closing argument — to make whatever they wish of that, and defense counsel will have plenty of opportunity to seek to insulate themselves from that.

Is there anything that is unclear about what I have just dealt with?

MR. FLAXMAN: I have two questions — well, two concerns. The first is that probably we need voir dire questions about social workers and those things, and how do you feel when somebody who talked to a social worker, that you are a social worker, something like that, which if that comes up --

THE COURT: I don't know why. Frankly —

MR. WILENS: I think it's irrelevant.

[14] THE COURT: Remember the only thing that would happen would be, when we talk about what the jury would learn, let's suppose in the examination or cross-examination of Ms. Redmond,

would be that after the incident the Village made arrangements for her to confer with somebody who is characterized — whatever her label is, social worker or whatever you want to call it. And you know that really doesn't bring that aspect into issue. It's not as though the — I don't understand what an attitudinal aspect on that subject would have to do with our lawsuit.

MR. FLAXMAN: Well, I am concerned, if I was a defendant I would try to get before the jury that she hasn't answered these questions because she has this privilege that she has asserted —

THE COURT: No, no. She is not going to get any opportunity to do that, because you know the Court's ruling is what controls that.

MR. FLAXMAN: Okay.

THE COURT: And therefore what the jury is going to hear about is just what I've indicated — and that is, that she and the Village have refused to make those things available.

MR. FLAXMAN: Okay.

THE COURT: The jury is not going to get an opportunity to second-guess on questions of privilege.

MR. FLAXMAN: Okay. The other issue that I am concerned about, and I haven't analyzed it at all, because I was [15] listening and it popped up in my head: if we get a verdict and they are going to appeal, if I was the defendants I would argue that this whole ruling is based on that assertion of privilege, and if the privilege really exists then judgment should be reversed. But I am not — I don't know if that's — I mean the issue —

THE COURT: Actually, you see, it doesn't rest in that sense at all. Remember the point that I have just made in which I ascribed the matter to Ms. Redmond's choice. Ms. Redmond indeed had the opportunity — assume that there was some kind of a privilege for a moment, as I have rejected. There's no reason in the world that Ms. Redmond, who after all is a litigant here, would not be in the position to waive that. Why would you suppose that I asked Ms. Redmond in the March hearing whether she would instruct Ms. Beyer to make these things available?

MR. FLAXMAN: But if there is a valid privilege which she could be entitled to and assert that privilege and suffer the consequences.

THE COURT: I am not sure that she would be entitled to do that in the face of the idea that she is being asked simply "What did you tell?" for purposes of seeing whether it is consistent with the later statement. I am not going to rule in advance on what may happen if the case goes in one direction. It will ultimately, I suppose, be for the Court of Appeals to deal with that. There is nothing in what I am doing that really [16] treats with that. My sense is that even if you may assume the privilege, that doesn't necessarily resolve the matter in that fashion, for some of the reasons that I have indicated — and there may be others. But that's for the future. * * *

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

EXCERPT OF PROCEEDINGS
AT TRIAL

* * *

[322]

(Whereupon the following proceedings were had at side-bar out of the hearing of the jury:)

MR. FUTTERMAN: Your Honor, this relates to the matter came up the other day concerning personal problems of the witness. We ask the witness at her deposition whether she was experiencing any personal problems on the day of this shooting and she denied that. Karen Beyer testified that in fact the witness disclosed to her that she was suffering from personal problems on the day of the shooting. We think that goes to the issue of her ability to perceive and understand what was going on and her state of mind.

[323]

THE COURT: Yes.

MR. ROGUS: Your Honor, you know my position. It's not my intention today to make a three-ring circus out of this. It is not my intention to pound on my table and carry on. But you know that I have disagreed with your ruling from day one. It is my intention to object for the record to anything happening at that trial with respect to communications between my client --

THE COURT: I understand that.

MR. ROGUS: -- and Ms. Beyer.

THE COURT: That's a standing objection. Okay?

MR. ROGUS: And the other thing is --

THE COURT: Of course, that really, I must tell you doesn't even go to the issue of personal problems that she may have. That is the question of whether she may have discussed those with Ms. Beyer is really separate and apart from the question whether there is a good-faith basis for inquiring of here her whether she was suffering from other distracting problems that affected her perceptions and affected her ability to conduct herself in the way that a reasonable police officer could conduct himself or herself at the time. That's really a separate issue.

Now whether then the further inquiry can be made if she denies the existence of personal problems, whether she did or did not discuss matters of that nature with Ms. Beyer that [324] brings us to the thing that you have just pointed to, and I have already held that a social workers -- and I guess I don't have to repeat the holding that I have dealt with it at some length -- is not someone for whom the privilege exists that extends to professionals who are categorized either doctors or MDs, practitioners or psychiatrists, I don't have to deal in a sense with the questions about whether that gets extended to psychologists. But I have rejected the idea that because some lobby may have created that sort of insulation under Illinois law that federal courts are bound by it. Social workers do not stand in the same stead and the same professional aspect although may characterize themselves that way, they create a self kind of certification process, but I have already ruled as far I am concerned and that stand for this trial. And you have got your record created. And I recognize that you don't have to keep repeating the objections. I will treat that as a standing objection.

MR. ROGUS: I have basically two related secondary objections. The First one, once again, it is my contention that the type of testimony, the type of information, that counsel seeks to inquire into, is the type of state of mind information that I respectively submit is simply not relevant to the objective reasonableness analysis. On that ground I would object to any inquiry. Part B of that submission to you is --

THE COURT: Is the acting wilful and wanton also?

[325]

MR. ROGUS: That's the state claim.

THE COURT: Yes. And doesn't that question also bear on the wilful and wanton?

MR. ROGUS: The fact that she may have been having personal problems?

THE COURT: No, no. The fact that she conducted herself in a particular way at a time when she was not in a position to in their argument. I am not subscribing to it. I am just characterizing which is what I have to do for relevance purposes, because he was not in a position to be exercising the objective judgments that the reasonable police officer would exercise. That's an aspect of a claim of willful and wanton misconduct, particularly if someone understands and perceives that she is having problems. And so you know it seems to me in relevance terms it's in the case. I recognize that the standard for 1983 is of course that of the objective police officer. And for that purpose subjective aspects are not in the case. But there is this case and added claim. And it seems to me it's relevant to the added claim.

MR. ROGUS: Part B of my position is even if relevant prejudice to my client's position in this case far outweighs any possible relevance that this evidence may have. And according to --

THE COURT: The issue on that score of course is unfair prejudice. Our Court of Appeals has commented frequently [326] if evidence is not prejudicial it's not admissible. The question that we deal with then is whether we have unfair prejudice. And what I have in that sense is that here we have a claim that if evidence of this nature is excluded becomes highly prejudicial to the ability to assert a claim that can be asserted in good faith. If the evidence is admitted it becomes highly prejudicial in the sense that I have talked about, not unfairly prejudicial, but highly prejudicial to the defendants. What that means is that it's probative. That is the reason that our Court of Appeals has said that the test is not one of prejudice but unfair prejudice. It may be considered as highly probative, and under the circumstances -- let me ask that.

I don't know for a minute what the personal problems or claimed personal problems were. But the inquiry into whether we had an officer who was at that time not in the position to exercise the judgments that a reasonable police officer confronted with the circumstances would exercise when that has resulted in a death strikes me as really odd to argue unfair prejudice. I suppose the ultimate unfair prejudice if in fact she he was not functioning properly, has been suffered by the decedent. So you know, I don't find a lot of comfort in the idea of saying, "Well, the evidence is unfairly prejudicial." If may be probative, but that's because it may -- and it may be powerful, but I don't know that. But I am not going to bar it in those terms for the reasons I have stated.

[327]

MR. ROGUS: It was my understanding from your earlier rulings — and perhaps once again we will continue to have a professional disagreement on this — that you had set parameters within which counsel could inquire and that those parameters did not include inquiry into matters of personal problems.

THE COURT: Remember what we are dealing with, we were dealing with a situation in which ultimately, you know she was given every opportunity to permit discovery, and the discovery has been done, we have no way -- no way of knowing whether those things would or would not have been subject to possible limitations, I have no way of knowing that. But the reason I have no way of knowing that is that I have been prevented from knowing that by your client's conduct. And you know, the idea -- that's essentially like saying that she ought to cry for mercy because having killed her parents she's an orphan. She's the one who has made it impossible for me to make the kind of calculated and careful judgment that I would like to make in any situation by being confronted with all of the facts. Those facts have been withheld from me just as they have been withheld from the plaintiffs, just as they going to be withheld from the jury. So the idea of saying, "Well, let's set up parameters," I am not in a position to guess, and I am rejecting that.

MR. ROGUS: Your Honor indicated that the jury would be informed certain matters have been withheld.

THE COURT: That's right.

[328]

MR. ROGUS: And this is an end run around that is my contention.

THE COURT: No.

MR. ROGUS: That things are not going withheld and they are going to be dangled in front of the jury, and then on top of it the jury is going to be told that things are being withheld from them.

THE COURT: I don't know. If there are personal -- she will, as I understand it, she will decline to say that there is anything that she was suffering from in terms of personal problems if she testifies consistently with her deposition, and they may be stuck with that and then with dealing the jury that an inference can be drawn but that's it.

MR. ROGUS: Okay.

THE COURT: Okay. (Whereupon the following proceedings were had in open

* * *

[339]

MARY LU REDMOND, PLAINTIFFS' WITNESS, DULY SWORN:

THE COURT: Please be seated. You may proceed, Mr. Futterman.

DIRECT EXAMINATION:

BY MR. FUTTERMAN:

Q. Please state your full name?
A. Mary Lu Redmond.

Q. How old are you?

THE COURT: Could you spell the first name, please, for us, Ms. Redmond?

THE WITNESS: Mary, common spelling, Lu, L-u.

Q. How old are you, Ms. Redmond?
A. 32.

Q. On June 27, 1991 you were a police officer with the Hoffman Estates Police Department, is that correct?
A. Yes, I was.

Q. And you had been there about five years, is that right?
A. Correct.

Q. And on that date you shot and killed Ricky Allen, is that correct?
A. Correct.

Q. Did the Hoffman Estate Police Department on that date [330] have any policy with respect to deadly force?
A. Yes, they did.

Q. Were you aware of that policy?
A. Yes, I was.

Q. Had you received a copy of that policy?
A. In my general orders.

Q. Did you sign and acknowledge that you had read that policy?
A. Yes, I did.

Q. Were you aware on June 27th, 1991 that as a police officer in Hoffman Estates you were allowed to use only the minimal amount of force necessary to preclude any physical attack either against a police officer or another person?
A. Can you repeat your question, please?

Q. Yes. Were your aware on June 27th, 1991 that as a Hoffman Estates police officer you were allowed to use only the minimum amount of force necessary to preclude any physical attack against a police officer or another person?
A. Yes.

Q. Were you aware on June 27th, 1991 that you were to use only reasonable means of apprehension or defense and exhaust those before resorting to deadly force?

A. Yes.

Q. Were you aware on June 27th, 1991 that the use of deadly force was only justified as a last resort to protect a police [331] officer or another person from death or great bodily harm?
A. Yes.

Q. Were you aware on June 27th, 1991 that under the Hoffman Estates Police Department's policy on deadly force that definition of deadly force included the pointing or firing of a firearm at a person?
A. Can you repeat that?

Q. Were you aware on June 27th, 1991 that under the definition of deadly force used by Hoffman Estates Police Department that one of the elements defined was pointing a firearm in direction of another person?
A. One of the elements?

Q. Yes.
A. It was my understanding that.

Q. Your Honor, may I ask the that witness answer that question "yes" or "no"?

THE COURT: I will permit might the witness to answer. It was your understanding that what?

THE WITNESS: That deadly force can only be used if another person —

THE COURT: Now wait. Then I think you have misunderstood the question, Ms. Redmond.

THE WITNESS: Perhaps I did.

THE COURT: The question was whether the definition of deadly force including pointing a firearm at another person? [332]

THE WITNESS: Yes.

THE COURT: Were you aware of that?

THE WITNESS: Yes.

BY MR. FUTTERMAN:

Q. And were you aware if you pointed a firearm at an unarmed person you were using deadly force?
A. I think I misunderstood your first — your last question.

Q. Do you want to change your answer?
A. The way I interpreted the question was if somebody pointed a firearm at somebody else.

Q. Right.
A. Right.

Q. If you as a police officer on June 27, 1991 —
A. Uh-huh —

Q. — pointed a firearm at another person under the definition of the Hoffman Estates Police Department policy on deadly force were you using deadly force?
A. To point a firearm at somebody — I am still not sure. Can you rephrase the question?

THE COURT: Ms. Redmond, I think that question has been stated in a forthright and manner that's capable of a "yes" or "no" answer. Were you aware that under Hoffman Estates Department definition of deadly force that pointing a firearm at another person was within that definition?

THE WITNESS: Yes.

[333] BY MR. FUTTERMAN:

Q. And you knew that was the definition of deadly force even if you pointed the firearm at an unarmed person isn't that correct?
A. That's correct.

Q. Did you know Ricky Allen prior to June 27th, 1991?
A. Yes, I did.

MR. ROGUS: Your Honor, I think with respect to that question I will object on grounds of relevancy.

THE COURT: Counsel, let's confer at side-bar.

(Whereupon the following proceedings were had at side-bar

out of the hearing of the jury:)

THE COURT: Unless there is something about that knowledge that enters into or arguably enters into the matrix of the reasonable police officer with that knowledge, how is it relevant?

MR. FUTTERMAN: She's previously denied that she knew Ricky Allen prior to June 27, 1991.

THE COURT: So that you were expecting a "no" answer?

MR. FUTTERMAN: Right.

THE COURT: And she has just given a "yes" answer?

MR. FUTTERMAN: Right.

THE COURT: Counsel, is only really attempting to establish a foundation that a reasonable police officer did not have as one of the circumstances any knowledge of this [334] defendant — of Ricky Allen, rather? And that — now wait a minute. That's a perfectly proper question, because basically what he was trying to do was to eliminate something as one of the factors. Now she has given a "yes" answer. I have to permit it. The question was a proper question given counsel's legitimate and reasonable expectations of the answer. Remember he was doing it basically to show that was not one of the factors in an equation of the reasonable police officer in her circumstance — if she had known him, for example, and known him to a brawler or whatever it is, that might be said to part of the — part of what the reasonable police officer in this situation would have as part a matrix for action. Counsel expected a "no" answer, and he is entitled now to pursue it. I have to overrule objection on relevance grounds because the question, given the expected answer, is certainly a relevant one.

(Whereupon the following proceedings were had in open

court in the presence and hearing of the jury:)

THE COURT: That objection has been overruled. Jesse, I think the question was answered. Do you want to read back the question and answer, please?

(Record read)

BY MR. FUTTERMAN:

Q. On the day of the shooting, June 27, 1991, were you having any personal problems in your life? [335]

MR. ROGUS: For the reasons that I indicated at side-bar as well as incorporating all my previous argument, I object,

THE COURT: That objection has been noted and I told you at side-bar that was going to be a standing objection. So you don't need to repeat it. It's overruled.

Did you hear the question?

THE WITNESS: Yes.

No, I was not.

BY MR. FUTTERMAN:

Q. Did you ever tell anyone that you were having personal problems on June 27, 1991?

A. No.

Q. Do you know a woman named Karen Beyer?

A. Yes, I do.

Q. When you were an employee of Hoffman Estates was she also an employee of Hoffman Estates?

A. She was employee of the Village?

Q. The Village of Hoffman Estates?

A. Correct.

Q. And after the shooting you had number of meetings with Karen Beyer, didn't you?

A. Yes, I did.

Q. And in fact you began to meet with her approximately a week or so after the shooting on the average of two to three [336] times per week, didn't you?

A. Approximately.

Q. And you had discussions with her about the shooting in some of those meetings, isn't that correct?

A. That's correct.

Q. And those discussions continued at least until January of 1992, isn't that correct?

A. Approximately. I don't know the exact date offhand.

THE COURT: Try to keep your voice up so all of the jurors can hear you. All right?

THE WITNESS: Okay.

THE COURT: You said "approximately." I am sorry. I didn't hear the answer.

THE WITNESS: I don't know the exact date but approximately that would be about the correct time.

BY MR. FUTTERMAN:

Q. And you told Karen Beyer that you couldn't remember pulling the trigger when you shot Ricky Allen isn't that correct?

A. I don't recall what my contents of the conversations I had with Karen Beyer were.

Q. You had approximately 50 to 75 conversations with her between July of 1991 and January of 1992, didn't you?

A. Yes.

Q. Is it your claim that you cannot recall any conversation [337] with Karen Beyer in which you related a fact to her about the shooting?

A. I know I related the facts of the shooting. The exact conversations I cannot recall. I would — I can't recall the exact conversations that I had with her no.

Q. Is it your testimony, Ms. Redmond, that you can't recall discussing the shooting incident with Karen Beyer on your first visit?

MR. ROGUS: I object to that question, your Honor. I think the witness —

THE COURT: That objection to the form of that question is sustained. But the objection as to the question itself substantively is overruled.

BY MR. FUTTERMAN:

Q. Is it your claim, Ms. Redmond, that you are unable to recall any discussion with Karen Beyer of the shooting incident on your first conversation with her?

A. I know I discussed the shooting with her, but I don't recall what the conversations were. I can't recall exactly what I said. I can recall the shooting but to recall the conversations is something different.

Q. Ms. Redmond, are you claiming that you cannot recall discussing with Karen Beyer the shooting on your first visit with her?

A. I don't recall the conversations we had. [338]

Q. The reason you went to see her was because of the shooting, is that correct?

A. That's correct.

Q. Do you claim that you cannot recall any discussions with Karen Beyer about any memory loss that you may have suffered about the incident?

A. I don't recall.

Q. Is it your claim that you can't recall telling Karen Beyer that you shot someone to death?

A. I can't recall.

Q. Is it your claim that you can't recall telling Karen Beyer how you happened to arrive on the scene of the shooting on June 27, 1991?

A. I can't recall the exact conversations I had with her, sir.

THE COURT: You are not — Ms. Redmond, let me just clarify it for you. You are not being asked to recall specific — the exact conversation, that's really not the thrust of the question. You have been asked about the subject matters.

And so that's what you are being asked to deal with, not whether a particular word was used or particular word was not used. Do you understand the question in that sense?

You should understand that's how Mr. Futterman — each of Mr. Futterman's questions up to this point has been framed, not in terms of exact verbatim recollection of the [339] conversations, but

he has dealt with the subject. All right?

THE WITNESS: Yes, your Honor.

THE COURT: All right. Do you want to read the last question back? I think Ms. Redmond may have misunderstood.

(Record read)

A. I can't recall.

BY MR. FUTTERMAN:

Q. Is it your claim that you can't recall telling Karen Beyer anything about two black women who approached your car when you arrived at the scene on June 27, 1991?

A. I can't recall.

Q. Is it your claim that you can't recall telling Karen Beyer how you came to draw your gun on June 27, 1991?

A. I can't recall.

Q. Is it your claim that you can't recall discussing with Karen Beyer at anytime after June 27, 1991 your description of the crowd of blacks that you saw near the entrance to the apartment building at 957 Grand Canyon when you arrived on the scene?

A. I can't recall.

Q. Is it your claim, Ms. Redmond, that you can't recall discussing with Karen Beyer who you saw coming out of the door of the entrance to the apartment building at 957 Grand Canyon?

A. I can't recall.

Q. Is it your claim, Ms. Redmond, that you can't recall [340] discussing with Karen Beyer your description of what you saw on June 27, 1991 when Thomas Jamell come out of the building that day?

A. I can't recall.

Q. Is it your claim, Ms. Redmond, that you can't recall discussing with Karen Beyer what you believe you saw Ricky Allen doing when you shot him to death on June 27, 1991?

A. I can't recall.

Q. Is it your claim, Ms. Redmond, that you can't recall ever discussing with Karen Beyer the decisionmaking process that you

went through on June 27, 1991 when you killed Ricky Allen?

A. I can't recall.

Q. Is it your claim, Ms. Redmond, that you can't recall discussing with Karen Beyer what happened at the scene immediately after you shot Ricky Allen?

A. I can't recall.

Q. It is your claim, Ms. Redmond, that you can't recall discussing with Karen Beyer the knife that you claim you saw in Ricky Allen's hands?

A. I can't recall.

Q. Is it your claim, Ms. Redmond, that you can't recall discussing with Karen Beyer this shooting incident with other officers employed by the Hoffman Estates Police Department?

A. I can't recall.

Q. Is it your claim that you can't recall discussing with [341] Karen Beyer statements made by other people that on the day in question the knife found at the scene was observed being moved by Hoffman Estates police officers?

A. I can't recall.

Q. Is it your claim, Ms. Redmond, that you can't recall discussing with Karen Beyer whether any officers of the Hoffman Estates Police Department informed you they would do whatever is necessary to protect you regarding this incident?

A. I can't recall.

Q. Is it your claim, Ms. Redmond, that you can't recall discussing with Karen Beyer the results of any investigations conducted by the Hoffman Estates Police Department concerning the shooting and killing of Ricky Allen?

A. I can't recall.

Q. Is it your claim, Ms. Redmond, that you can't recall discussing with Karen Beyer how your involvement in the shooting incident such as the one that took place on June 27, 1991 might affect your memory?

A. I can't recall.

Q. Is it your claim, Ms. Redmond, that you can't recall discussing with Karen Beyer any statements by her that there may be

some memory gaps in your memory regarding the shooting incident?

A. I can't recall.

Q. Is it your claim, Ms. Redmond, that you can't recall [342] discussing with Karen Beyer whether you had any doubts about your conduct on June 27, 1991 when you shot and killed Ricky

Allen?

A. I can't recall.

Q. Is it your claim that you can't recall discussing with Karen Beyer how you aimed your weapon and shot Ricky Allen?

A. I can't recall.

Q. Is it your claim that you can't recall discussing with Karen Beyer whether you pointed your weapon at any other person at the scene before or after you shot Ricky Allen?

A. I can't recall.

Q. Is it your claim that you can't recall discussing with Karen Beyer what you saw or what you think you saw when Ricky

Allen and Thomas Jamell were outside of the apartment building?

A. I can't recall.

Q. Is it your claim that you can't recall discussing with Karen Beyer whether in fact you were able to see what Ricky

Allen was doing as he moved through the crowd of blacks that were in front of the apartment building on June 27, 1991?

A. I can't recall.

Q. Is it your claim that you can't recall discussing with Karen Beyer how far away from Thomas Jamell you thought Ricky

Allen was when he comes out of the building on June 27, 1991?

A. I can't recall.

Q. Is it your claim that you can't recall discussing with [343] Karen Beyer what you said to the crowd of blacks that you saw in front of the building when you got of your squad car and started approaching the entrance 957 Grand Canyon on June 27, 1991?

A. I can't recall.

Q. Is it your claim, Ms. Redmond, that you can't recall discussing with Karen Beyer what you claimed you said to Ricky Allen after he came out of the building at 957 Grand Canyon on June 27, 1991?

A. I can't recall.

Q. Is it your claim, Ms. Redmond, that you can't recall discussing with Karen Beyer your ability to make quick decisions?

A. I can't recall.

Q. Is it your claim, Ms. Redmond, that you can't recall discussing with Karen Beyer the decision you made to shoot and kill Ricky Allen on June 27, 1991?

A. Can you repeat that, please?

Q. Is it your claim, Ms. Beyer —

THE COURT: Ms. Redmond.

Q. I am sorry. That you don't recall discussing with Karen Beyer your ability to make a decision to shoot and kill Ricky Allen on June 27, 1991?

MR. ROGUS: That was asked and answered, I thought, Judge.

THE COURT: No, this is a separate question. The [344] earlier one that was asked and answered was about an ability to make quick decisions. Objection is overruled.

MR. ROGUS: So the record is clear, your Honor, it is my understanding that respect to my stated objection before that all of these questions Mr. Futterman is now asking or encompassed within my standing objection.

THE COURT: Yes, that's been made plain enough. And the objection — the standing objection has been overruled.

BY MR. FUTTERMAN:

Q. Do you have the question, Ms. Redmond?

A. Yes, I do. I can't recall.

Q. Is it your testimony — strike that. Do you claim, Ms. Redmond, that you can't recall discussing with Karen Beyer the

general subject of your memory about this incident?

A. I can't recall.

Q. Is it your claim, Ms. Redmond, that you can't recall discussing with Karen Beyer your emotional state immediately prior to your pulling the trigger on your gun and killing Ricky Allen?

A. I can't recall.

Q. Is it your claim, Ms. Redmond, that you can't recall discussing with Karen Beyer why you felt it was necessary to fire your gun at Ricky Allen on June 27, 1991?

A. I can't recall.

Q. Is it your claim, Ms. Redmond, that you can't recall [345] discussing with Karen Beyer your recollection of blood flowing from the mouth of Rick Allen after you shot him to death?

A. I can't recall.

Q. Were you aware that Karen Beyer made notes of the conversations that she had with you?

A. I am aware of that now.

Q. And you don't want her to produce those notes, do you?

A. No.

Q. In fact you won't authorize her to produce those notes if such authority is needed from you, is that correct?

A. That's correct.

Q. And to this very day you won't authorize her to turn over those notes, would you?

A. That's correct.

MR. FUTTERMAN: No further questions, your Honor.

THE COURT: Counsel, may we confer for a moment at side-bar?

(Whereupon the following proceedings were had at side-bar out of the hearing of the jury:)

THE COURT: I don't have that earlier deposition at hand, but I suspected from the whole line of questions that this was the straight repeat of questions that were posed to Ms. Redmond at her

deposition, is that right?

MR. FUTTERMAN: At the hearing and at her deposition.

THE COURT: Yes. Are you seeking to introduce those [346] as reflections of the same lack of recollection at an earlier time closer to the incident? I wanted to know when we are going to be through with her so far as your case is concerned? My reason for asking that is I don't want to have her essentially called back, for example, a second time in connection with your case-in-chief, simply, for example, you know that those things are basically, if they are admissible are simply admissible because of party admissions, you understand? So I wanted to find out what your — well, maybe you haven't thought that one through, so let me pose — at this point you had said that you thought you were probably going to simply reserve —

MR. ROGUS: I have one or two quick questions but, I will be reserving.

THE COURT: All right. Well, then as far as this is concerned there won't be a need on your part to be calling her for purposes of identifying those things because they are — to the extent they are admissions, they are admissible basically independently. Okay.

MR. FUTTERMAN: I think at some point for the closing our case, we will just move for the admission of those questions and answers from the deposition and the hearing. I could ask her one more questions. I suppose I could ask one more question, which is: You were asked those question and gave those answer on two prior occasions in this case.

MR. ROGUS: I am going to object to that, your Honor. [347]

THE COURT: Well, the issue is — the purpose for which these things are offered is in terms of a claimed lack of credibility, I think, as I understand it. Okay. And therefore the same questions and responses at a date closer to the incident would bear on credibility. So what's the basis for the objection.

MR. ROGUS: Questions as to whether she recalls being asked all of these questions about whether she recalls —

THE COURT: No, no, no, no, no, no, no. The question whether was she asked the same questions and did she respond in the same manner on later occasions, I am not sure that's needed given the fact that, you know, she has been statements -- she has given statements under oath, and those are basically independently admissible to the extent that they are — you know, that they pass the evidence test, they are party admissions. I suppose that maybe instead of asking whether asked the same questions and answers, maybe simply ask her did she give answer under oath on two — on a couple of occasions identifying that, and that's it.

MR. ROGUS: That would be fine. Counsel is able to point to every one of these questions that he just put to the witness as having been put to her previously.

THE COURT: Well, he doesn't have to. That's why I say all he has got to do is to get a confirmation that she was — that she had given sworn testimony on a couple of prior [348] occasions. The contents of those, whether those are admissible, is a separate issue. Okay.

MR. ROGUS: Yes.

(Whereupon the following proceedings were had in open court in the presence and hearing of the jury:)

THE COURT: Mr. Futterman, do you have —

MR. FUTTERMAN: Just a couple more questions.

THE COURT: Yes.

BY MR. FUTTERMAN:

Q. Ms. Redmond, on three separate prior occasions you have given sworn deposition testimony in this case, is that correct?

A. Yes.

Q. And on two other prior occasions you gave sworn testimony in two proceeding in this case, is that correct?

A. Yes.

MR. FUTTERMAN: Thank you. No further questions.

CROSS-EXAMINATION:

BY MR. ROGUS:

Q. Mary Lu, for now I just want to ask you one or two quick follow-up question. Mr. Futterman had been asking you some questions about your knowledge of the Hoffman Estates Police Department policy with regard to the use of deadly force. Back on June 27, 1991 were you aware that policy prohibited you from firing warning shots?

A. Yes. [349]

Q. With respect to all of these meetings that you have indicated that you have had with Karen Beyer, do you know as you sit her today how many such meetings you had?

A. Not offhand.

Q. Have you had more than 50?

A. More than 50.

Q. And over how long a period of time were those meetings held?

A. Approximately since July '91 to perhaps February of '92, somewhere in that range.

MR. ROGUS: Thank you. I have no further questions of the witness at this time, your Honor, with the understanding that I reserve the right to call her in my case.

THE COURT: You reserve the right to recall, of course. Any further redirect examination?

MR. FUTTERMAN: Yes, your Honor, just a question or two.

REDIRECT EXAMINATION:

BY MR. FUTTERMAN:

Q. As I understand your testimony you do remember when you started seeing Ms. Beyer and when you stopped seeing her, is that correct?

A. That is correct.

MR. FUTTERMAN: No further questions, your Honor.

THE COURT: Thank you very much. You are excused at [350] this time.

THE WITNESS: Thank you.

(Witness excused.)

THE COURT: Plaintiffs' next witness.

MR. FUTTERMAN: Yes, your Honor. We are asking her to come in.

THE COURT: All right.

MR. FLAXMAN: Our next witness is Karen Beyer, who they are getting.

THE COURT: Thank you.

Step up here, please, to be sworn?

(Witness Sworn)

KAREN BEYER, PLAINTIFFS' WITNESS DULY SWORN

DIRECT EXAMINATION:

THE COURT: Mr. Flaxman, you may proceed.

MR. ROGUS: Your Honor, not to cut off my esteemed opponent, but I don't want to renew my objection at that point before this witness begins testifying for all of the reasons that I have stated at side-bar, incorporating all of my previous references I submitted to the Court.

THE COURT: Well, the objection in that sense is of course premature. You have stated your position with respect to certain aspects of the appropriate testimony, and those objection stand as a standing objection. But the objection as to calling a witness is both inappropriate and premature, and [351] that is of course overruled. Now, Mr. Flaxman, you may proceed.

BY MR. FLAXMAN:

Q. Thank you, Judge.

Could you state your name, please, and spell your last name?

A. Yes. My name is Karen Beyer, B-e-y-e-r. Karen within a K.

Q. And back in July of 1991 were you employed by the Village of Hoffman Estates?
A. Yes, I was.

Q. And in the course of your work for the Village of Hoffman Estates did you have an occasion to meet with the defendant Mary Lu Redmond?
A. Yes, I did.

Q. And did you meet with Ms. Redmond on more than one occasion?
A. Yes.

Q. Did you meet with her on more than 50 occasions?
A. Probably.

Q. And when you met with here did you ever make any notes of your conversations with her?
A. Yes.

Q. And when you made notes of your conversations with her did you write down some of the things that she told you?
A. On occasions. [352]

Q. And as you sit her today, is it fair to say that you remember some of the things that you she told you?
A. Yes.

Q. Do you remember that she told you that she had been having personal problems about the time she shot and killed Ricky Allen?
A. Yes.

Q. And did you make a note of that? Did you right that down anywhere?
A. Not specifically in that way, no.

Q. Well, did you write down anything that relates to what she told you about the personal problems she was having at the time she killed Ricky Allen in July of 1991?

A. I don't believe so.

Q. Okay. Now did you talk with Mary Lu Redmond about what happened, what she was doing at the time she killed Ricky Allen in any of those 50 sessions?
A. Yes.

Q. And did you write down any of the things she told you about the incident when she killed Ricky Allen?
A. I did not write down any of the things that she specifically told me.

Q. Well, did you ever write down that she told you that she could not remember pulling the trigger?

MR. ROGUS: I object to that question, your Honor, [353] based on the witness' last answer to the last question.

THE COURT: That objection is overruled. This examination, I should add, is permissible under Rule 611. And accordingly the objection is overruled.

THE WITNESS: Yes. At one point in time she did say that to me. She was concerned about details like that.

Q. Okay. And was she able to recall details of the incident when spoke with you in those 50 sessions?
A. Yes. And she even later recalled pulling the trigger.

Q. Did she ever tell you, "I can't recall how I got there"?
A. No.

Q. Did she ever tell you, "I can't recall what the people were doing when I got there"?
A. No.

Q. Did she ever tell you that she can't recall how far the two men were away from each other when she shot and Ricky Allen?
A. We never talked about that specific thing.

Q. Now when you wrote down what she told you were those on papers that had been provided to you by the Village of Hoffman Estates?

A. Yes.

Q. And those papers belong to the Village of Hoffman Estates, is that right?

A. My belief is they belong to the client and to the therapist. [354]

Q. Do you have those notes with you, ma'am?

MR. ROGUS: I am going to object to this, your Honor. May we have a side-bar, please?

THE COURT: Just a moment.

(Whereupon the following proceedings were had at side-bar out of the hearing of the jury:)

MR. ROGUS: If I may —

THE COURT: Just a moment.

(Pause)

Are we going to clear up — and I will get back to our objection in just a minute. Are we going to clear up this business about therapist, you know a self-characterization or not? I am very troubled by —

MR. ROGUS: He raised the answer, your Honor.

THE COURT: No, he didn't invite that answer. But in any event, what is the objection?

MR. ROGUS: The objection is —

THE COURT: He asked whether she has got the notes with her?

MR. ROGUS: Correct. The issue here is previous refusal to turn over those records, therefore giving rise to this allowance to the jury to draw and adverse inference if they so see fit.

THE COURT: Right. Are you suggesting that she is prepared now? [355]

MR. ROGUS: I don't know if that's what counsel is getting at it. It is not a discovery exercise, we are now on trial.

THE COURT: Let me ask you. I guess that I commented when I heard about this that I thought the positions had sort of been turned around. Are you inviting her to produce these now?

MR. FLAXMAN: Yes, Judge, I am. I think that there is a — I think the jury is entitled to know that the refusal to turn over these papers is a decision of Hoffman Estates and it's continuing up to the time of trial, are these documents that we are laying the foundation for — Jesse is looking at me, I will slow down — that she made contemporaneously with conversation that contains statements and that weren't given to us up to this very moment.

MR. ROGUS: The problem we have, your Honor, is that she is no longer with the Village, and I believe she has the records, and those records are now within her right to control on the decision of whether to turn over or not in. You are trying to create an inference that the Village is stonewalling on an issue based on what someone who is not —

THE COURT: That's why I say it seems to me maybe the positions have turned around. If she has got them with her then I am not sure that question is now relevant, and that your objection, I think, is a sound one. If counsel is representing that to his knowledge, the Village does not have these records [356] at this point, then I think his objection to the question whether she has them now is a proper objection.

MR. FLAXMAN: Well, I didn't hear him represent that the Village doesn't have the papers. That might be something that we can take up out of the presence of the jury.

MR. WILENS: I can represent that I have spoken with Peter Berger who is the Clerk for the Village of Hoffman Estates and he will testify that the notes are no longer there.

THE COURT: Okay. If that's so, I am going to sustain the objection, because it seems to me that the question of her as to whether she has those notes is really at that point inappropriate in terms of the relevance to our case. Our case involves Hoffman Estates as a defendant and Mary Lu Redmond as a defendant. And I think that's a proper objection, and not Karen Beyer.

MR. FUTTERMAN: She previously testified that those notes belonged to the Village of Hoffman Estates.

MR. ROGUS: She also testified —

THE COURT: That's all right. If you want to — if you want to bring that in by way of impeachment you may do that, so that that's proper. But I think that the objection is still a sound objection.

MR. FLAXMAN: Could we take a morning break an instruct the witness not to refer to herself as a therapist, and reject the volunteered answer? [357]

THE COURT: Well —

MR. FLAXMAN: After a few more questions.

THE COURT: Well, you can ask her what her occupation is. You don't want to do that?

MR. FLAXMAN: I don't want to do that. I didn't want her to say she was a therapist, but she wanted to volunteer that.

MR. ROGUS: That's what you get for lobbing a fat one, counsel.

THE COURT: Well, on the contrary. You know, you can't really expect that somebody is — you can't legitimately expect that somebody is going to do that in those terms. I think that it is better to the matter clarified on the record, not that she just stop referring to herself that way. She has also already pulled that trigger and that bullet can't be stuffed back into the muzzle. The appropriate way is to ask her, I think what is her occupation. As I understand it, she is — or can you read — so that the matter — you can ask is she a social worker, and I will simply tell the jury that the self-characterization of therapist is something that they are not to take into account, and it's really inappropriate.

(Whereupon the following proceedings were had in open

court in the presence and hearing of the jury:)

THE COURT: That objection is sustained.

[358] BY MR. FLAXMAN:

Q. Do you remember testifying at an earlier proceeding in this case when you were asked —

THE COURT: Well, first that's the first question. Do you remember testifying at an earlier proceeding in this case?

THE WITNESS: Here in a courtroom, yes.

BY MR. FLAXMAN:

Q. And do you remember at that earlier proceeding telling us that those records were the property of the —

THE COURT: Mr. Flaxman, question and answer for the witness. Okay.

MR. FLAXMAN: Okay.

THE COURT: And refer to the transcript page, if you will, for counsel's information.

MR. FLAXMAN: At page 9 of the March transcript.

Do you remember being asked this question and this answer:

"Question: Did you prepare notes in connection with

your interview of Mary Lu Redmond?"
And you told us "Yes."
And then you were asked, "Is it correct" —

MR. ROGUS: Counsel, that wasn't on that page, was it?

Your Honor, I just want to clear up the questio[illegible]'s put to the witness isn't on that page that he is referring to.

MR. FUTTERMAN: At page 10.

MR. ROGUS: Page 10. Thank you. [359]

MR. FUTTERMAN: At page 10.

"Did you prepare notes in connection with your interviews with Mary Lu Redmond?" and you answered "Yes."

Do you remember that question and that answer?

MR. ROGUS: The line number on that, counsel?

MR. FLAXMAN: Line 10. Do you remember that question?

MR. ROGUS: Excuse me. Are you looking at this? Please show me where that is.

MR. FLAXMAN: I apologize, but we are having a technological breakdown.

Page 9. Line 10.

"And did you prepare notes in connection with you interview of Mary Lu Redmond?" And the answer was "Yes."

MR. ROGUS: May I have my transcript back?

MR. FUTTERMAN: Sure.

Do you remember that question and that answer?
A. Yes.

Q. And then you remember the next question and answer:

"Is it correct that those notes are the property of the Village of Hoffman Estates?"

Do you remember that question?
A. Yes.

Q. And do you remember what your answer was then?
A. I recall —

THE COURT: Mr. Flaxman, the proper way to deal with [360] that is to read the question and answer to the witness and ask whether the witness recalls that question being asked and that answer being given. It is not a memory test in that sense.

BY MR. FLAXMAN:

Q. All right. The question:

"Is it correct that these notes are property of the Village of Hoffman Estates?

Answer: I would assume so. They are also the property of the client." Do you remember that question and that answer?

THE WITNESS: Yes, I remember it was a question

THE COURT: That's the only — the answer to that one is either "yes," "no," or "I don't remember."

THE WITNESS: Yes.

BY MR. FLAXMAN:

Q. Now are you currently employed by the Village of Hoffman Estates?
A. No.

Q. Do you remember back at that March hearing the next question on line 17, counsel.

"So it is correct that if you stopped working for Hoffman Estates you would leave the notes there?"

And your answer was, "Yes." Do you remember that question and that answer?
A. No. [361]

THE COURT: Counsel are you are prepared to —

MR. ROGUS: I will lend counsel my transcript.

MR. FLAXMAN: Thank you.

BY MR. FLAXMAN:

Q. Can you look at this and tell us what it is?
A. It's a transcript of proceedings March 8, 1993.

Q. And that's the date that you came here to give some testimony in this case, is that right?
A. Right.

Q. And did you sit in the same chair that you are sitting in now?
A. Yes.

Q. And before you testified did you take the same oath that you took today to tell the truth?
A. Yes.

Q. And was the same gentleman sitting here writing down what you were saying as the court reporter?

A. I don't know.

Q. Okay. Well, could look at page 9?
A. Yes.

Q. Line 23?
A. Uh-huh.

Q. And you see that question on line 17:

"So is it correct that if you stopped working for Hoffman Estates you would leave the notes there?" and the answer [362] "Yes."

A. Uh-huh.

Q. And after having looked at that transcript do you recall that question and that answer?

A. I do not recall it, but I am sure if it's written here that it is correct, and I said that.

Q. Okay. Can I have the transcript back?

And when was it that you stopped working for Hoffman Estates?

A. In the end of May of this year.

Q. Okay. Now when you had these conversations with — well let me go back. In the course of this lawsuit when you worked for Hoffman Estates you turned over three pages of your notes to us, is that right?

A. Correct.

Q. And before your turned over those three pages of those notes you crossed out a lot of words, is that right?

A. Yes. Uh-huh.

Q. Were your notes more than three pages? Your total notes that you took the time that you saw Karen Beyer — Mary Lu Redmond. I am sorry.

A. Yes.

Q. And you gave us excerpts of three page, is that right?
A. Yes.

Q. And when you spoke with Karen Beyer those — [363]

THE COURT: That is Mary Lu Redmond.

Q. I am sorry. When you spoke with Mary Lu Redmond those 50 times, did she ever tell you that she couldn't recall show she drew her gun.

A. I don't remember her specifically saying that.

Q. She specifically saying she couldn't recall?
A. Correct.

Q. Did she ever tell you that she couldn't recall the crowd of black people that came up to her?

A. No.

Q. Did she ever tell you that she could not recall who she saw coming out of the apartment building?

A. No.

Q. Did she ever tell you that she couldn't recall what she saw at the scene?

A. No.

Q. Did she ever tell you that she couldn't recall what she believed Ricky Allen was doing at the time she shot him?

A. No.

Q. Did she ever tell you that she couldn't recall anything about the incident?

A. No.

Q. When she talked to you she had a very clear recollection of what she believed she did that day, is that right?

A. Yes. [364]

Q. She didn't seem to be suffering from any memory lost when she was talking to you, is that right?

A. As I said before she was preoccupied with very small details that most people would have no concern if they could not recall. But at times she worried about very — not recalling very small details.

Q. Now your profession is a social worker, is that correct?

A. Yes. I am a licensed clinical social worker in the State of Illinois.

Q. Okay. And those notes that you took during those conversations are those the kind that you think would help Mary Lu Redmond remember what she told you?

A. Some of the content of those notes would help her, yes.

Q. Okay.

I have nothing further.

THE COURT: Mr. Rogus.

CROSS-EXAMINATION:

BY MR. ROGUS:

Q. When you left your employment with Village of Hoffman Estates did you take those notes with you?

A. Yes.

MR. ROGUS: Thank you. No further questions.

THE COURT: Anything else, Mr. Flaxman?

MR. FLAXMAN: Nothing, Judge.

THE COURT: Thank you. You are excused.

* * *

[361]

MARY LU REDMOND, DEFENDANTS' WITNESS PREVIOUSLY SWORN:

THE COURT: Ms. Redmond, you recognize that you are still under oath?

THE WITNESS: Yes.

THE COURT: Mr. Rogus, you may proceed.

MR. ROGUS: Thank you, your Honor.

DIRECT EXAMINATION:

BY MR. ROGUS:

Q. Mary Lu, I want to direct your attention back to June 27 1991. I believe you've already indicated you were employed as a police officer by the Village of Hoffman Estates on that date, correct? [372]

A. Yes.

Q. What was your rank?

A. I was a patrol officer.

Q. And as a patrol officer what were your duties and responsibilities.

A. Patrol the area I was assigned, receive any calls that I might have that gotten from the dispatch.

Q. As a patrol office do you work a particular shift?

A. Yes.

Q. And in Hoffman Estates at that time did the shifts rotate or did you always work the same shift?

A. At that time the shifts rotated together every 28 days.

Q. On the particular date that we are talking about, June 27, 1991 what shift were you working?

A. I was working the second shift which would be days.

Q. And days would consist of from when until when?

A. It was the summer, so that would have been 0740 hours to 1600 hours.

Q. Okay. Now for those amongst us who don't talk in military time all the time what does 0740 hours mean?

A. It means 7 a.m. to 4 p.m.

Q. Okay. At sometime on June 27th, 1991 did you have occasion to report to the Grand Canyon Estate Apartments?

A. Yes.

Q. How was it that you came to go to the Grand Canyon States [373] Apartments?

A. I was assigned a call along with Officer O'Keefe of a fight in progress.

Q. How were you assigned that call?

A. Through the telecommunications, the dispatcher.

Q. Where were you when you received that call?
A. I was on Grand Canyon — check that — I was on Higgins Corridor and I just pulled behind an alleyway and strip mall when I received the call.

Q. Were you in your squad car?
A. Yes.

Q. Is that a marked squad car?
A. Yes.

Q. Were you in uniform?
A. Yes.

Q. Was there anyone else in your squad car with you when you received that call?
A. No.

Q. What did you do after you received that call?
A. I acknowledged that I had heard the call, and I gave my location from where I was at.

Q. How does — how do you acknowledge that you received the call?
A. Well, once I received the call then I have to get back on the — I have to get on the radio and acknowledge that I [374] received the call, telling them where my location is so they know where I am in proximity to where the call was I was assigned to.

Q. Okay. Did you do that?
A. Yes.

Q. And what's the next thing you did then after acknowledging the call?
A. Started to drive to the location.

Q. And how long did it take for you to get to the location from the point that you were at when you got the call?
A. Maybe a minute and a half, two minutes.

Q. Where was it that you drove your squad car to?
A. 957 Grand Canyon Boulevard.

Q. Was there a parking lot area located there?
A. It's an apartment complex, and I pulled into the parking lot.

Q. Now as you were pulling into the parking lot, what if anything did you notice in the area in front of 957 Grand Canyon?
A. As I pulled into the parking lot I noticed two black women who were waving their arms above their head as I was pulling into the entrance of the complex and I saw them running toward my squad.

Q. How was it that they were waving their hands? Can you shows us with a gesture how they were doing it? [375]
A. They were running and they were waving like this in a motion (indicating) above their heads. Obviously I viewed this as to get my attention.

Q. Okay. The record should reflect the witness was just waving both hands at once —
A. Yes.

Q. In an inward and outward fashion?
A. And they were running towards me when they saw my squad.

Q. When you first noticed that was your vehicle still moving or had you completely stopped?
A. I was still moving because the parking lot of that complex you pull right in and you can either go left or go right.

Q. Which way did you go?
A. Right. In the direction of 957 where they were coming from.

Q. Did you eventually stop your squad car?
A. Yes, I did.

Q. Where.
A. I pulled up in front of 957. I had my squad on an angle because there were numerous opening spaces, and I just pulled right up in front.

Q. Did you have the front of your squad car facing the building or away from the building?

A. It was facing the building but it was on an angle. I [376] didn't like park — take the time to pull in or park in a space. It was just open spaces, and I just pulled in on an angle.

Q. When you brought your squad car to a completes stop what is the next thing that you observed, if anything?

A. The women were at my — the two women were at my car at the time when I stopped.

Q. What do you mean "at your car?"

A. Well, they come up to my squad. As I was pulling in they kept running towards me, and when I got there they stopped. I stopped and they were at my window.

Q. What if anything happened next?

A. Well, one of the two women related that there had been a stabbing inside.

Q. Did she use that word "stabbing"?

A. Yes.

Q. When she said that were you inside your car?

A. Yes, I was.

Q. You had your window down?

A. At the time I was talking to her I had it down.

Q. What did you do after she told you that?

A. I relayed to the base telecommunications, the dispatcher that gave me the call, that there had been a report of a stabbing.

Q. What's the next thing that happened?

A. She had asked me if she should dispatch an ambulance and [377] I had related to her that that would be a good idea.

Q. I'm sorry. What did the dispatch ask you?

A. The dispatcher asked me if she should call an ambulance.

Q. What did you say in response?

A. And I said, "Yes that would be a good idea."

Q. Now when that interchange took place were you still inside of the squad car?

A. Yes, I was.

Q. And did you notice where the two black women you had seen a short while ago were?

A. They were still right at my car door.

Q. What is the next thing that you did?

A. I exited the vehicle then. And I started to walk up towards the apartment building 957.

Q. As you did that you have anything in either of your hands?

A. No.

Q. Did you have your weapon out?

A. No.

Q. At anytime as you were walking toward the building did you take your weapon out of our holster?

A. As I was walking toward the building, no.

Q. Did you eventually take your weapon out of your holster?

A. Yes.

Q. Where were you when you did that? [378]

A. At that point I had moved on to the grass.

Q. Where were the two black women who you had seen a short while earlier at this point in time?

A. As I started walking up to the building they were behind me, and then I moved onto the grass and those two women were still to — it would have been my left, slightly behind me.

Q. Were there any other police officers present at the scene at this particular moment?

A. No.

Q. Were you looking toward the building?

A. Yes.

THE COURT: Mr. Rogus, may we avoid leading the witness?

MR. ROGUS: Yes, sir.

BY MR. ROGUS:

Q. What if anything did you see next?

A. As I was walking up towards the building and I was still on the sidewalk I saw approximately five subjects, five male subjects exhibit the building in a hurry. They ran outside the building, Turned westward which would have been to their left, and just on the grassy area they stopped. One of the subjects had a pipe in his hands.

Q. Which hand.

A. Which hand I don't know. I can't recall which hand he had that in. [379]

Q. Did you observe anything further about those particular subjects?

A. Yes. As they started to move on the grass is what made me move towards the grass and of the sidewalk. They were all milling amongst themselves, they were screaming, and yelling. The subject with the pipe had the pipe raised above his head and he was waving it.

Q. What is the next thing that you observed happen?

A. The crowd, the group of men that exhibited the building were all — well, they were yelling and screaming and was waving the pipe. And I had ordered him to drop the pipe several times, and he did not drop the pipe. I had ordered everybody to get on the ground, and he did not — nobody was listening, nobody was on the ground.

Q. At this point did you have your weapon out?

A. After he did not drop the pipe and I yelled several times to drop the pipe, then I drew my service weapon.

Q. And what did you do with it when you drew it?

A. I just drew it and I just held it down.

Q. Can you stand up and demonstrate for the ladies and gentlemen of the jury how you were holding your weapon just after you drew it?

A. Okay. I have to move to the side.

MR. ROGUS: Your Honor, if the witness may step down.

THE COURT: She may step down. [380]

A. I am right-handed, so I would have drawn the weapon out and just brought it down.

Q. So you had both lands on it?

A. Yes.

Q. Okay. And if the record would reflect — would you please do that again?

A. (Indicating).

Q. That the witness has her hands together, her arms straight forward in front of her pointing at an angle downward toward the ground.

THE COURT: Her hands at about waist level.

MR. ROGUS: Thank you. Would you resume the stand?

BY MR. ROGUS:

Q. How long did you remain in that position?

A. Immediately after the first group of subjects came out of the building, they were still in the area just onto the grass. Immediately after that I saw two other subjects exit the building.

Q. Let's talk about the first subject?

A. Okay.

Q. Can you describe that subject?

A. He was a male white subject, taller, thin build maybe about 6 feet tall, six feet one, brownish or sandy-colored hair and.

Q. What. I am sorry. Were you finished? [381]

A. He was thin.

Q. What if anything did you observe that subject do?

A. He was running.

Q. From where?

A. He exited 957, the apartment building, it's hallway that you can come out of, he exited that, and he turned to what would be his left again heading westward through the grass.

Q. As he did that what if anything else did you observe?

A. I observed another man a male black subject with a butcher knife directly behind him.

Q. Where was that male black subject when you first saw him?

A. He was coming out of 957 Grand Canyon. I saw them both exiting the door.

Q. How far behind the first subject was the second subject?

A. A couple of feet. He was directly behind him.

Q. What is the next thing that you observed?

A. The male white subject ran either through the crowd of the first group of subjects that were just — they were still milling around on the grass area. As they exited the door there are some bushes and they turned towards what would be the west.

And they were still there was a lot of commotion, and they were still yelling. He either ran through them or just between them and the bushes.

Q. What did the second subjects, do if anything?

A. He followed him the entire time. He kept — be followed [382] in his direction.

Q. What is the next thing that happened?

A. I ordered the male black subject with the knife to drop the knife several times. I told him to drop the knife and get on the ground.

Q. How did you order him?

A. I was yelling at him to drop the knife and get on the ground.

Q. What is the next thing that happened?

A. Well, he did not drop the knife, and he did not get on the ground. He actually had gained on the first subject, the male white subject who exited the door first. The distance between them was decreasing. He was directly behind the first subject.

Q. When the second subject had made it to the lawn area —

A. Right. They had passed through the crowd, and there was like a little clearing on the lawn.

Q. Did you observe whether he was holding anything at that time?

A. The second subject, the male black subject.

Q. Yes.

A. He was holding a butcher knife.

Q. How was he holding it?

A. He was holding it in his right hand like this (indicating) out as he was running the entire time from when he [383] exited the door and then he kept chasing him and he gained on the first subject.

Q. For the record, you just made a gesture with your arm. Would you show the jury again the gesture?

A. He was returning like this with the knife, the blade pointed outward.

Q. Now you have your elbow bent?

A. Yes, it was bent.

Q. And then the lower part of your arm, from your elbow to wrist, you have pointing straight upward?

A. That's right? He was running like this (indicating).

Q. And which direction was the blade of the knife facing?

A. It was pointing outward, which would be west, which is the same direction they were running, which was right behind the first subject that had exited the building in front of him.

Q. What is the next thing that happened?

A. I kept ordering for him to drop the knife and he did not drop the knife.

THE COURT: About how many times did you do that?

THE WITNESS: Several times. As he was gaining speed on the first subject until they were directly — he was directly in front of him, like the first subject's back, and then the second subject, as he was gaining on him the second subject, the male black subject with the knife took the knife back, raised it above his head and I waited, and as he started to come down with [384] the knife and made the downward motion, I fired one shot at him.

BY MR. ROGUS:

Q. Will you describe the motion that you went through in firing the shot?

A. As they were coming out the building I had already moved onto the grass. And as they were running I was following their pattern, and I was keeping my eyes on the male black subject with the knife and how I observed how he was gaining on the other subject. I did not even have time to square up.

Q. What do you mean when you say "square up"?

A. Like in a proper stance that you would have — I didn't have time to square my body up to the subject.

MR. ROGUS: Your Honor, if I may ask the witness to step down just momentarily to demonstrate what she is referring to?

THE COURT: You may do that.

MR. ROGUS: Ms. Redmond, will you step down for a moment, and show the ladies and gentlemen of the jury what you mean when you say "square up"?

A. Okay. Say if I were standing here and the door would be approximately over by the table, as he exited the door, he started running towards west, this would be the west. I was standing here, and as they were running I didn't have time to take the steps to support my body, so my hands — I had to come up as I followed their motions, so my arms came up as I followed [385] their motions.

Q. What's a square-up stance? Show what you mean by square-up stance?

A. Technically, I mean the ideal situation when I am shooting at an angle I am going to shoot straight on.

Q. So in other words a square-up stance?

A. Well, it's like that (indicating).

Q. You would have your arms straight in front of you?

A. Yes. Ideally you want to — or a lever stance, which would be like that (indicating), but I never shot like that.

Q. Okay. When you would you "square up" your method of doing would be to have your feet parallel?

A. Right.

Q. But you had indicated that there is another possible way to do it?

A. Yes.

Q. And that involves doing what?

A. It would be the lever stance, which would be like to side, but as I qualified and I was training I trained this way. I felt more comfortable this way (indicating).

Q. On the day in question did you ever assume that position?

A. No. No. I had — there wasn't time to do that.

Q. What motions did you go through then in bringing the gun from the position you had it pointed where your wrists were about waist left to the position you were holding it when you [386] fired the shot?

A. When I fired I had to fire at an angle because the knife was coming down, I had to bring gun up like so (indicating). So I am actually fired at a slight angle.

Q. Okay. Resume the stand, please.

Once the second subject got pass that — strike that. Did he get pass that crowd of five people that you had seen?

A. Yes, they both did.

Q. Once he got pass that crowd of people how much time elapsed before you fired the shot?

A. A few seconds. Three or four seconds.

Q. Could you tell how close you were standing to that subject at the moment you fired the shot?

A. It was approximately ten feet.

Q. When you fired the shot —

THE COURT: Pardon me for interrupting. Were they both running all this time?

THE WITNESS: Yes, they were, your Honor.

THE COURT: Go ahead.

BY MR. ROGUS:

Q. When you fired the shot what did you observe about the second subject, the black with the knife in his hands?

A. Okay. As I fired a shot at the point of impact his entire upper body, he jerked back, he spun 180 degrees and fell to the ground. So he actually his head was then pointing in a [387] westward direction and his feet were pointing eastward. So he kind of spun and appeared to be in the opposite direction.

Q. How did he land?

A. He landed flat on his back.

Q. Did you see what happened to the knife?

A. Yes.

Q. What happened to the knife?

A. After I had fired the shot I ran up towards him, and the knife was laying on the ground.

Q. Where in relation to his body?

A. It was on his right-hand side, I would say approximately between his shoulder like in his knee area.

Q. And could you estimate the distance that the knife was lying from the body?

A. Maybe a few feet, two or three feet.

Q. What did you do then at this point where you had arrived at the position you just mentioned?

A. Okay. Well after I fired the shot the first subject he had dove to the ground, so he was a little bit in front of the other subject. And I was standing then in between the two subjects and kind of on an angle so most of my back was towards the building. I was on an angle, I wasn't completely back towards the building but on an angle where a good portion of my back was, because I had to keep watching the rest of the crowd, what was going on. [388]

Q. Where was the rest of the crowd at this point?

A. Well, the fire subjects that originally came out of the building first they were still there. The two women were still there. But after the shot was fired people came pouring out of the buildings and people were coming from everywhere, so I can't tell

you.

Q. What did you do when you saw that going on?

A. Well, the first subject, the male white subject, I interpreted he was trying to get up.

THE COURT: No, the question is what you did.

BY MR. ROGUS:

Q. What did you do?

A. I though this was —

Q. Well, I want to know what you did?

A. Okay. Well, I stood there and I was calling for more backup to get the ambulance there.

Q. How were you doing that?

A. My portable radio.

Q. And where was your portable radio?

A. It's on a belt and then there is receiver that is clipped actually to your shirt.

Q. So how would you utilize that then?

A. Just press it and talk into it.

Q. Before you did that did any other officers appear at the scene? [389]

A. No.

Q. How long was it after you used the radio before you noticed another officer on the scene?

A. I would say about a minute, minute and a half approximately.

Q. Now during that minute, minute and a half, did you have an opportunity to observe where the first subject was located?

A. Yes, I did.

Q. And where was he in relation to where you were standing?

A. He would have been a little bit behind me on an angle. Since my body was turned I was trying to be able to watch what was going on. He was in front the male black subject that was on the ground. In front meaning he was further west and he was a

MR. FUTTERMAN: And PX 7 is a handwritten draft of a report. Look at this report, Ms. Redmond. And do you see in this report where it says, "Several male black subjects ran out of building," do you see that? [412]

A. Yes. Move your finger so I can read it.

Yes, that's what I wrote.

Q. And then I show you for reference Plaintiffs' Exhibit 8.

THE COURT: 8.

BY MR. FUTTERMAN:

Q. Is that the redraft of the report?

A. Can I look at this to make sure it's the right one?

THE COURT: You will have to keep your voice so that the jury —

THE WITNESS: I want to look — there are several reports here and I want to make sure.

THE COURT: You may do that. Just as a matter of making sure that whatever you say is on the record.

THE WITNESS: Okay. Yes, "Several male black subjects."

BY MR. FUTTERMAN:

Q. You had it two times, didn't you?

A. Yes.

Q. So, is it correct then that there were only three blacks who came out of the building?

A. I believe I said to the Syre interview that there were approximately five male subjects at the time — five or three, there was a group of male subjects that exited the building turned to the left leave and were on the grassy area.

Q. So you don't know whether it was three or five? [413]

A. It could — perhaps it was 3, 4 or 5. There was a group of subject exiting the building.

Q. What were these subjects doing?

A. They ran out of the building, they turned to the left and in the grass just outside the doorway. One person had a pipe in their hand, and he was waving the pipe above his head, and I didn't not at that point if that was the fight in progress that I was being called to.

Q. Let me ask you a question. When you say five — "3, 4, 5 came out of the building," did they all come out at once? 3, 4 or 5 come through the doorway at once?

A. One right after the other. A whole crowd came out.

Q. So when the first one came out did that first one stop so the second one could catch up, and then the third one, then the fourth and then the fifth one?

A. There was a group that ran out of the building that turned slightly into the grass, they stopped and milling amongst themselves. One had a pipe above their head, they were screaming and they were yelling.

Q. They came out one at a time. My question for you is did the first one come out and stop, and the second one come out and catch up with the first, and then the third one come on and catch up with the first two?

A. What you are describing is to me I take it as an orderly fashion, and that is not how it was. They ran out of building. [414]

Q. One at a time?

A. I couldn't tell you if it was one at a time or two trying to squeeze through the door at the same time. I mean it's just a doorway, exiting the building. They just ran out.

Q. Then they stopped running as soon as they ran out of the building?

A. They ran out of the building, they turned west.

Q. And stopped?

A. They were milling amongst themselves.

Q. Well, they stopped running at some point?

A. They stopped running but they did not stop moving. They were moving amongst themselves in the same area, yelling. The man with the pipe still had it waving it about his head, and

they were all screaming.

Q. So he never dropped it, is that your testimony?
A. I never saw him drop it.

Q. Oh, he have dropped it and you don't know about it?
A. When I saw the subjects run out of the building with the knife that's what I focused on the pipe at that point.

Q. Now you say that the male — the white male came out of the building, was he running?
A. Yes, he was.

Q. Did he have anything in his hands?
A. Not that I saw.

Q. You saw nothing in his hands? [415]
A. No.

Q. Did you have a clear view of him as he came out of building?
A. Yes, I did.

Q. And you saw nothing in his hands?
A. No.

Q. And then did he turn to the left as he came out of building?
A. Yes, he did.

Q. Did he run through the crowd of five or three or four or however many blacks there were?
A. He ran through it or he ran between the crowd, and there is some bushes that are before the building. He either ran — the crows was milling around. And I can tell if he ran straight through the crowd or could have ran just directly behind the crowd — between the crowd and the bushes.

Q. When he ran through the crowd or straight behind the crowd you couldn't see him for a moment, could you?
A. I could see him. I couldn't see his entire body. I could see him.

Q. You couldn't see his hands? You couldn't see his arms? You couldn't see the hands or the arms of the crowd of blacks, is

that right?
A. When I saw the knife I could see the body of the white subject exit the building. He was going either through the [416] crowd or behind the crowd. I don't know if he ran directly through the middle of them, or just right behind them. I mean where they were standing, where the bushes were, we are talking just a matter of feet.

Q. When he ran through the crowd, Ms. Redmond —

THE COURT: Or behind the crowd.

Q. Or behind the crowd, was he slowed up in any way by the crowd of blacks?
A. It appeared to me as if he was trying to run as fast as he could.

Q. Well, the question is was he slowed up in any way? He didn't get slowed up, did he?
A. I don't recall.

Q. Now you say then the black subject came out right behind him, is that correct?
A. Correct.

Q. Did anybody come out between the two of them?
A. No.

Q. Are you sure about that?
A. Yes.

Q. Did anybody come out right behind the black subject who you claim was carrying the knife?
A. When I saw the black man come out with the knife raised up chasing somebody else, my vision was directed towards that scene. [417]

Q. Your Honor, I move to strike the witness' answer as being nonresponsive to the question.

THE COURT: Do you want to read the question back, Jesse?

(Record read)

THE COURT: Ms. Redmond, I understand your answer to be that you didn't see anyone and you have explained that as the

reason for that?

THE WITNESS: Yes.

THE COURT: I will overrule the motion to strike.

BY MR. FUTTERMAN:

Q. How far behind the white subject was the black subject when you first saw them come out of the building?
A. A few feet.

Q. Two?
A. Two or three feet.

Q. Two or three feet?
A. Yes.

Q. And from the time they came out of the building until the time they got over by the black crowd, did that gap narrow?
A. He was — the second subject, the male black subject with the knife was gaining on the first subject.

Q. So by the time they got to the crowd he was right on top of him?
A. They had gone either through the crowd or directly behind [418] the crowd. Once they cleared the crowd he had gained on him to where he was directly behind him.

Q. So he wasn't directly behind him when he came out of the door?
A. He was two or three feet behind him.

Q. So by the time they got pass the crowd of blacks that were standing there he was one foot behind him?
A. One to two feet. He was directly — he was directly he behind him, yes?

Q. So were able to perceive that this black subject with the knife you claim you saw had gained one foot from the time he came out of the building until the time they passed through the crowd?
A. When they exited the building there was either two or three feet from the one — the one that first exited the building they were behind the crowd that was milling around.

THE COURT: Ms. Redmond, you have already testified to that. If you address, please, the question that counsel put to you.

THE WITNESS: Your Honor, I am sorry.

THE COURT: You were saying — were you able to perceive that there had been a gain of about one foot in that time span?

THE WITNESS: Yes. He was directly behind him. Yes, he did gain on him between the time span.

[419] BY MR. FUTTERMAN:

Q. So by the time they came through the crowd they were one foot apart, is that what your testimony is?
A. When they hit the clearing they were one or two feet apart. They were right there.

Q. Well, was the male white running in a straight line or was he running on an angle toward the street?
A. Exit the building turn west.

Q. That's left?
A. That's left. The building is on a slight angle. He didn't run directly parallel to the building, but he was not running towards the street. He was running out into the grass in an open area.

Q. So he was running away from the building, is that what your testimony is?
A. No, he wasn't running away from the building, but he was not running parallel to the building.

Q. Was he running toward the building?
A. No.

Q. If he wasn't running toward the building and wasn't running parallel to the building, and he wasn't running away from the building, where was he running?
A. He was running on an angle, that's a westward angle.

Q. Away from the building or toward the building?
A. It was away from the building but not away from building [420] toward the parking lot. It was away from the building to the grassy area.

Q. And where was the male black whom you claim you saw with the knife, where was he running?

A. The same direction. He followed him in the same direction.

Q. And this male black you claim had a butcher knife, is that correct?

A. That is correct.

Q. Now, when the male black came out of the building did he have the butcher knife in the up-raised position?

A. He had it in his right hand and was holding it like so (indicating).

THE COURT: The same position you previously indicated from the beginning?

THE WITNESS: Yes, from the beginning. He came out the door like this (indicating) holding it like this (indicating).

BY MR. FUTTERMAN:

Q. Was the door when he came out?

A. I don't know. When I first saw them come out the door — the door didn't open and then I saw somebody. I just saw them running out.

Q. So they both came through the open door at the same time?

A. One right after the other. [421]

Q. Did the door close before the second person came out?

A. No.

Q. Did it begin to shut?

A. No. Once I saw the second subjects, the male black with the knife, I have followed —

Q. Your Honor, excuse me. I move to after the "no."

THE COURT: I will strike that. That's granted.

BY MR. FUTTERMAN:

Q. Now you claim that the male black subject raised his butcher knife you claim he had up over his head at the instance

before you shot him, is that correct?

A. As he — as the distance between the two decreased and he was directly behind he, he raised the knife back up towards the back of his head, and I waited until he started to bring the knife down. Once I saw the downward motion I fired one shot.

Q. I am not sure I understand what you said. Did you just tell us a while ago that as soon as the male white and male black emerged from either within the crowd or between the crowd and the bushes, that the gap between them was one foot?

A. When they came out —

Q. Is that what your testimony is? When they got through that crowd or either between the crowd and the building as they passed in the clearing there was only a one-foot separation.

MR. ROGUS: Your Honor, I object to the question.

THE COURT: One or two feet. [422]

MR. ROGUS: Thank you.

THE COURT: That was your testimony?

THE WITNESS: Yes. One to two feet.

BY MR. FUTTERMAN:

Q. Was he still gaining on him?

A. Yes, he was gaining on him.

Q. Was he running up his back?

A. Well, he was that close, yes.

Q. Was he touching him with his legs?

A. They were directly behind each other.

Q. Ms. Redmond, they were running, weren't they?

A. Yes, they both were running.

Q. And were their arms swinging back and forth?

A. The male black subject arm was up in the air like this (indicating) while he running, and he was gaining —

Q. Where was his —

A. — on the other subject.

Q. Where was his left arm?
A. I wasn't paying attention to the left arm.

Q. Where were the arms of the white male? Did you see what they were doing?
A. I don't recall where his arms were.

Q. You said at some point the two females who had approached you when you first entered the parking area joined the crowd of blacks that were milling about in the front of the building, is [423] that correct?
A. Yes.

Q. Did you see them do that?
A. After I fired the shot and ran up towards the body then the crowd have kind of were milling amongst themselves.

Q. My question though is before you fired the shot did you see the two females join the other black males who were milling about in front of the building?
A. I misunderstood your question. Then no.

Q. You didn't see that?
A. No, I did not see that.

Q. And what you yelled when you saw the man who you claim was holding a knife was, "Drop the knife," is that what you said?
A. "Drop the knife and get on the ground."

Q. And that's all you yelled?
A. Yes.

Q. How many times?
A. Several times.

Q. Was it two, three, four?
A. At least three times. I just kept yelling the minute I saw him.

Q. And that's all you yelled?
A. "Drop the knife, get on the ground."

THE COURT: How far apart were those things that you [424] yelled?

THE WITNESS: One right after another. I just keep repeating it. I didn't stop, just kept yelling, "Drop knife and get on the ground, drop the knife get on the ground," just like that.

THE COURT: And you said that you did that at least three times?

THE WITNESS: Yes.

BY MR. FUTTERMAN:

Q. How long did it take you to get from the car to the grassy area where you pulled your gun?
A. A second or two. I mean it's not a very long sidewalk.

Q. How long was it before you reached that point that you saw the five or three or four blacks come out of the building?
A. As I started to walk up the sidewalk it was just a couple of seconds after I got out of the car they came out of the building.

Q. Were you standing in position when they come out of the building?
A. What position?

Q. On the grass?
A. No. I was walking up the sidewalk as they were — they ran out of the building.

Q. you said you yelled something at them when they come out of the building, is that correct? [425]
A. Right. As they moved onto the grass I told the subject with the pipe to drop the pipe, and then I started yelling to get on the ground.

Q. How many times did you yell that?
A. A couple of times. I kept yelling to drop the pipe and get on the ground.

Q. Nobody was paying any attention to you, is that correct?
A. Nobody was paying attention.

Q. Perhaps because they couldn't hear you?

A. No.

Q. Do you know whether they heard you?
A. A reasonable person should have been able to hear me.

Q. Do you know whether they heard you?
A. I can't say if one person can hear another person at any time.

Q. You said you didn't have time to square up —
A. Uh-huh.

Q. — when you shot. After you shot were squared up?
A. No. After I shot I started to run up towards the body.

Q. With your gun drawn?
A. I was running my gun was at my side.

Q. Your gun was where, I am sorry?
A. I was running up towards the body. My gun was still out.

Q. Did you point the gun at anybody after you shot Ricky Allen? [426]
A. Yes, I did.

Q. How many people did you point the gun at?
A. In the crowd several people on different occasions started to charge at me, and they were yelling and the crowd is quite hysterical. When he got to a certain point that I felt my safety was in jeopardy, my gun came up, and I kept telling them to get back, get down, get beyond the sidewalk, get on the ground. And when they came within a point where it was in my safety zone, yes, the gun came out.

Q. How close did they get to you before your gun came up?
A. It would be right before arm's length.

Q. So you just held your arms out in front of you hands clasped together, you had your gun, and there was somebody that close to you coming at you, is that your testimony?
A. Yes. I had somebody charging at me, not very happy, and they are screaming hysterically.

THE COURT: Limit yourself, if you will, to responding to the question, please. The question was what was the distance.

THE WITNESS: The distance?

THE COURT: Yes. Was the person on people that you are referring to almost at arm's length from you — that is just beyond arms's length?

THE WITNESS: Just beyond arm's length. If my arms were out, their arms were out, they could reach and be able to [427] touch me, the gun would have been up.

BY MR. FUTTERMAN:

Q. Now didn't one or two people in the crowd attempt to go to Ricky Allen's body?
A. No.

Q. Nobody did that?
A. Not that I recall.

Q. Not that you recall.
A. I didn't see that.

Q. You didn't see that. You were standing right by Ricky Allen's body, weren't you?
A. Yes, I was.

Q. Didn't somebody try to come to his aid and tell you that she was a nurse's assistant?
A. No.

Q. That never happened?
A. That never happened.

Q. Nobody else tried to go to Ricky Allen's aid, is that correct?
A. No. When Officer Graham arrived, he walked towards the body.

Q. Before Officer Graham arrived, did anybody try to go to Ricky Allen's aid?
A. No.

Q. You didn't say to a black female who tried to go to Ricky [428]
Allen's aid, "Get back or I'll blow your head off"?
A. No.

Q. Did you say that at all that day?
A. No.

Q. You remember that you didn't say it?
A. Yes.

Q. That's something you do recall?
A. I never said that.

Q. When you saw the two subjects running through the grass how far away from you were they?
A. As they exited the building and ran out side on an angle, so in the beginning I would say about 15 feet. Then as they ran on the angle, it would have been closer, about 10 feet at the point of where I initially fired the shot.

Q. When you say "angel" you mean they were both running on an angle away from the building?
A. They were on a slight angle. Well, first of all, the building is on a slight angle. They were running out into the grass. They didn't exit the building and abruptly make a right-angle turn and run directly along the building.

Q. Did the white male who came out of the building stumble and fall down on his back just after he came out?
A. No.

Q. He didn't fall and stumble about 6 or 8 feet from the sidewalk and wind up on his back? [429]
A. No. When I fired the shot he dove to the ground and he was on his stomach.

Q. Your Honor, I move to strike everything after "No."

THE COURT: Yes, I will sustain a motion to strike.
And please, Ms. Redmond, limit yourself, if you will, to responding directly to the questions.

BY MR. FUTTERMAN;

Q. Now as I understand your testimony when you shot Ricky
Allen you saw him spin around, is that correct?
A. He spun 180 degrees, yes.

Q. And he wound up on his back?
A. Yes.

Q. And his head was pointing toward the entrance of 955, is that correct?
A. If that would be the next apartment west of 957, yes.

Q. As you face the building —
A. Uh-huh.

Q. — and look at the 957 entrance —
A. Yes.

Q. And the 955 entrance being the next entrance to the right as you are facing the building —
A. Uh-huh.

Q. — Ricky Allen's head was pointing towards that entrance, is that correct?
A. That is correct. [430]

Q. And his feet were pointing toward the 957 entrance, is that correct?
A. That's correct.

Q. And you claim that the knife was between Ricky Allen's right side as he lay on the ground and the building, is that correct?
A. That's correct.

Q. By the way, as a police officer are you trained to have good powers of observation?
A. Well, I think that would be a qualification for the position.

Q. As a matter of fact from time to time you served as an evidence technician for the Hoffman Estates Police Department, didn't you?
A. Yes.

Q. And that involves going to the scene of a crime or an incident and retrieving information and retrieving items that may be at the scene, isn't that correct?

A. That's correct.

Q. And you have to very carefully note what objects are when you retrieve them, don't you?

A. Yes.

Q. And you have to know the difference between left and right, don't you?

A. Yes. [431]

Q. And you would expect all police officers would know that difference, right? Is that correct?

A. That's correct.

Q. And so if any police officer said the knife was to the left of Ricky Allen's body either that officer would be incorrect or you would be incorrect, you agree?

A. The knife was to the right of Ricky Allen's body.

Q. Did any officers to your knowledge write any reports saying the knife was to the left of the body?

A. Not to my knowledge.

Q. Did anybody to your knowledge — have you ever heard that somebody claims the knife was under Ricky Allen's body?

A. Not to my knowledge.

Q. Would you agree that the knife couldn't be to the left and to the right and underneath Ricky Allen's body?

A. Yes. It couldn't have been in all three locations.

Q. Right after the shooting would it be fair to say that you were bewildered?

A. No.

Q. That is not an accurate characterization?

A. No.

Q. You had your full faculties about you right after the shooting?

A. Yes.

Q. Would you say that anybody who claims you were bewildered [432] was not telling the truth?

A. Yes.

Q. Is it correct, Ms. Redmond, that you never saw a knife in Ricky Allen's hand?

MR. ROGUS: Object to that question.

THE WITNESS: No, that's not correct.

MR. ROGUS: Your Honor —

THE COURT: Counsel, let's confer at side-bar.

(Whereupon the following proceedings were had at side-bar

out of the hearing of the jury:)

THE COURT: I guess that's a classic cross-examination question, you know. I recognize, indeed, on direct — toward the end of direct examination — if you recall you asked several questions of a direct nature which were leading type but are always permitted when counsel is attempting to reinforce a witness' rejection of the position the other side is taking. So just as I certainly didn't interrupt, you know, your question along those lines, even though technically I think those were leading, they are always permitted, because they are always regular, and this is certainly permitted as part of cross-examination.

My reason for asking for the side-bar is that I didn't want to have a similar objection in a position to other question that effectively say "Isn't this so," you know, "Isn't that so," to which the witness will undoubtedly give the denial. Okay. [433]

MR. ROGUS: Thank you.

(Whereupon the following proceedings were had in open

court in the presence and hearing of the jury:)

THE COURT: That objection is overruled. Do you want to restate the question?

BY MR. FUTTERMAN:

Q. Ricky Allen did not have a knife in his hand on June 27, 1991 when you saw him, isn't that correct?

A. That is not correct.

Q. There was no knife near his body after you shot him isn't that correct?

A. That is not correct.

Q. The white subject that you claim you saw being chased by Ricky Allen, he wasn't in any danger on June 27, 1991 when you shot Ricky Allen, isn't that correct?

A. That is not correct.

Q. By the way, was Ricky Allen on his stomach at anytime while you were there?

A. On his stomach?

Q. Yes.

A. No.

Q. Weren't you told, Ms. Redmond, by officers of the Hoffman Estates Police Department that they were going to protect you in this case?

A. No. [434]

Q. You were never told that?

A. I was never told that.

Q. You know, don't you, that if Ricky Allen didn't have a knife your shooting of him was not justified under Hoffman Estates Police Department deadly force policy, is that correct?

A. If Ricky Allen didn't have a knife I wouldn't have shot him.

THE COURT: That is not the question, Ms. Redmond, and the jury will disregard that.

Do you want to read the question back to the witness, please?

(Record read)

THE WITNESS: Yes.

MR. FUTTERMAN: No further questions, your Honor.

MR. ROGUS: Your Honor, if I may just have a brief moment?

THE COURT: Surely.

REDIRECT EXAMINATION:

BY MR. ROGUS:

Q. Mary Lu, what is your understanding of the meaning of the word bewildered?

A. Dazed, not knowing what's going on. Out of control.

Q. Okay. Thank you.

No further questions, your Honor.

THE COURT: Anything else? [435]

RECROSS-EXAMINATION:

BY MR. FUTTERMAN:

Q. Yes, your Honor.

And after you shot Ricky Allen, weren't you dazed and not knowing what was going on?

A. No, that's not true.

MR. FUTTERMAN: No more questions.

THE COURT: Thank you.

Anything further, Mr. Rogus?

MR. ROGUS: No, your Honor.

THE COURT: You are excused.

(Witness excused)

* * *

[675]

MR. FUTTERMAN: Thank you, your Honor.

CLOSING ARGUMENT ON BEHALF OF THE PLAINTIFF:

* * *

[677]

You will recall that one of the questions that we asked Mary Lu Redmond, when she was on the stand was, "Were you having any personal problems on the day of the shooting?" And [678] you remember what her answer was? She didn't say, "I can't recall," to that one. She said, "No."

And then we asked her, "Did you ever tell anybody that you were having personal problems on the day of the shooting?" And once again she remembered her answer to that one. She didn't say, "I can't recall," she said, "No."

Not an hour later Karen Beyer took the stand and proved that Mary Lu Redmond had lied about that point, because Karen Beyer said that Mary Lu Redmond told her that she was having personal problems on the day of the shooting. We don't know what those personal problems are. We can't even begin to imagine: Was it a termination of a relationship with a loved one? Was -- had something happened to her that caused her to be upset? We don't know. But we do know this: As you hear this story unfold again you will find that Mary Lu Redmond did not act responsibly that day.

* * *

[685]

We asked Officer Redmond about her conversations, you will recall, with the Village employee, Karen Beyer. She said she had maybe 50 to 75 conversations with Karen Beyer. And she said that the reason that she was having these conversations with Karen Beyer was because of the shooting. So you would think that she'd be able to remember some facts that she relayed to Karen Beyer about the shooting.

You will remember that long series of questions that I went through with her about various facts pertaining to the shooting. Who came out? What were they doing when they came out? What was Ricky doing when he come out? What was TJ doing? What were the people on the scene doing? What did you talk to Karen Beyer about with respect to the knife? Pulling the trigger?

Whether you had any loss of memory? Every one of those questions, she said, "I can't recall." And remember it [686] was made clear to her by the Judge that she wasn't being asked to recall specific conversations like, "What did you say to her on December 12th, 1991?" She was being asked about subject matters. What did you say to Karen Beyer about subject matter one -- for example, the knife? What did you say to Karen Beyer about Ricky Allen running out the door? She could not recall anything. Now I ask you, can you believe that?

I mentioned a moment ago that Karen Beyer had indicated that she made notes of the conversations that she had with Mary Lu Redmond. Remember Officer Redmond knew that Karen Beyer was making notes. And she said here in the courtroom for you all to hear that she didn't want Karen Beyer to provide those notes to us. She also said here in the courtroom that she wouldn't authorize Karen Beyer, if her authority was needed, to turn those notes over. And she said that even though the Court had ordered previously in the case that those notes be turned over. But you know what was real interesting about her testimony with respect to Karen Beyer? She could remember the date she started talking to her. And she could remember the date when she stopped talking to her. Nothing in between.

What did Karen Beyer say? You remember Karen Beyer. She came in right after Mary Lu Redmond in our case. She confirmed that she made notes. She admitted that she wrote down things that Redmond said. She was forced to admit here in the courtroom that those notes were the property of the defendant [687] Hoffman Estates. That if she stopped working there, she would have to leave the notes there. She admitted giving us three pages of crossed-out notes. A couple of phrases on them, we couldn't read what she had crossed out. And remember what she said about those notes, and Redmond's ability to recall. She said those notes would help Karen Redmond recall what Karen Redmond said -- what Mary Lu Redmond said to Karen Beyer. Excuse me.

Now you are going to get an instruction when the Judge instructs you on the law in this case. And the Judge is going to tell you that those notes were Village property and that he ordered the Village of Hoffman Estates to turn those notes over to us, that

the Village refused. That the Village had numerous chances to turn those notes over to us. That Redmond refused to turn those notes over to us. The Judge will tell you that there is no legal justification for that refusal. And he will tell you that under these circumstances that you are entitled to presume that the contents of those notes would be unfavorable to Mary Lu Redmond and to the Village of Hoffman Estates.

Now let's turn to Mary Lu Redmond's testimony when she was called as a witness for the defense. Do you remember what she said about her memory? She said, "It's better today than it was two and a half years ago." Totally unbelievable. We mentioned the gratuitous comments she made before about the housecoats, and we showed you how that was a lie. We showed you [688] during her examination, when she was testifying for the defense, how she was so certain that when she got out of the car she was walking with her gun pointed down -- like this (indicating), instead of like this (indicating).

Then we asked her, "Don't you remember you had an interview a few hours after the incident?" And she acknowledged that she had that interview by another police officer. And we said to her, "Didn't you tell the interviewer that you couldn't recall how you were holding your gun?"

Of course, her answer to that was, "I don't recall." And then we showed her the statement that she gave to that police officer, and showed her where she had said to him, on the day of the incident, just a few hours after it happened, she couldn't remember how she was holding her gun.

* * *

[700]

CLOSING ARGUMENT ON BEHALF OF THE DEFENDANT:

MR. ROGUS: May it please the Court, counsel, ladies and gentlemen. * * *

[724]

What was it that counsel was asking her about that she could not recall? It wasn't the occurrence. It was not the facts of the occurrence. It was what she talked about the occurrence with another individual, Karen Beyer. I respectfully submit to you, there is a world of difference between not being able to remember the event itself and not being able to remember what you might have said to another person over the course of 50 to 75 meetings that took place over a 6 month period. You're talking apples and oranges here. You're talking apples and [724] watermelons. They are two entirely different things. And yet that's the whole basis of this full frontal assault on the credibility of Mary Lu Redmond. That she couldn't remember what she discussed with Karen Beyer.

A very interesting thing happened in this trial and I hope you caught it, ladies and gentlemen. You see counsel did throw a lot of questions at Mary Lu Redmond about what she's claiming she can't recall telling Karen Beyer. And Mary Lu came right and told you: I don't recall. I don't recall. And, of course, the other side wants you to start thinking, "Well, gee, she can't recall. She's not worthy of belief."

Then what do they do to follow up this assault on credibility of this police officer who had just made this very difficult decision? Well, then they bring Karen Beyer in and they put her on the stand. They ask her some questions about those conversations, too. I hope you recall that testimony. If not, perhaps I can refresh your recollection. Beyer is asked also a whole bunch of questions. The same kinds of questions about same kinds of subject material or subject matter that counsel questioned Mary Lu Redmond about.

Question to Karen Beyer -- by the way this is page 35, December 15, 9:30 a.m., line 10.

"Did she ever tell you I can't recall how I got there?"

Karen Beyer's answer: No. [725]

Next question: Did she ever tell you I can't recall what the people were doing when I got there?

Karen Beyer's answer: No.

Nest question: Did she ever tell you that she can't recall how far the two men were away from each other when she shot and

killed Ricky Allen?

The answer: We never talked about that specific thing."

There's more. Page 45.

"Question: I'm sorry when you spoke with Mary Lu Redmond those 50 times, did she ever tell you she couldn't recall how she drew her gun?

Answer: I don't remember her specifically saying that.

This is Karen Beyer not remembering. This is not Mary Lu Redmond. This is Karen Beyer telling you this.

"Did she ever tell you that she couldn't recall the crowd of black people that came up to her?"

Answer: No.

"Did she ever tell you that she could not recall who she saw coming out of the apartment building?"

Answer: No.

"Did she ever tell you that she couldn't recall what she saw at the scene?"

Answer: No. [726] "Did she ever tell you that she couldn't recall what Ricky Allen was doing at the time she shoot him?"

Answer: No.

"Did she ever tell you that she couldn't recall anything about the incident?"

Answer: No."

Well, now ask yourself this: What's so incredible about Mary Lu Redmond not being able to recall things that she talked to Karen Beyer about, when Karen Beyer is telling you they didn't talk about it? Where is the impeachment?

MR. FUTTERMAN: Objection.

THE COURT: Mr. Rogus, that objection is sustained. That was not the testimony. The testimony was not they didn't talk about it in response to a question that says, "Did she ever tell you

this," and the answer is "No." It's not a fair characterization of the testimony. And the objection is sustained.

MR. ROGUS: Has Mary Lu's version about what happened been rebutted? * * *

[731]

THE COURT: Please be seated. Members of the jury, the conclusion of closing argument, rebuttal on behalf of plaintiffs will be by counsel Kenneth Flaxman. Mr. Flaxman.

MR. FLAXMAN: Thank you, your Honor.

* * *

[733]

Another thing that he knows, which he tried to slip past you and the judge stopped him, was that when Karen Beyer testified, she didn't say that Mary Lu Redmond had a memory problem when we talked. Karen Beyer said Mary Lu Redmond had no trouble at all remembering anything about the incident. She could remember the most minute details. What did Mary Lu Redmond say when she sat in this and she was asked questions about what happened? She was asked: Well, do you remember what you told Sgt. Sizer right after the incident about whether you had your hands up when you were getting out of the car? What did she say? She said: I don't recall. What did Mary Lu Redmond say when she was asked: When you saw that white man running, did he slow down as he ran through that crowd or around that crowd or underneath that crowd? What did she say? She said: I don't recall. What did Mary Lu Redmond say when she was asked: Did you talk to Officer Graham when he come on the scene? Now put yourself in her place. You've just killed somebody and you think there is a knife next to his body. What are you going to say? You are going to say: Watch out for that knife. Make sure that knife doesn't move. What did she tell us when she testified? "I don't recall what I told Graham."

The reason why she doesn't recall, the hard questions, is because she made up the story to help her live with this [734] horrible thing that she did back in 1991. When she killed an unarmed

man when she shouldn't have. When she deprived Ricky and Brandon of their father. She's made up a story to let her sleep at night. But it's not a true story. It's not a story that's worthy of any believability at all. It's a story that you, the jury, should say: We don't believe that. This is a lie. Just like Mr. Rogus said when he told you his version of the incident, but omitted Mary Lu Redmond's recollection. Her story. Her incredible tale of those five men who are coming out of this door.

* * *